SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 438.

THE UNITED STATES OF AMERICA

vs.

THE MONTANA LUMBER AND MANUFACTURING COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company (a corporation), the Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants in error. } No. 941.

In the matter of the certification of certain questions of law to the Supreme Court of the United States.

1 At a stated term, to wit, the October term, A. D. 1903, of the United States circuit court of appeals for the ninth circuit, held at the court room in the city and county of San Francisco, State of California, on Monday, the 5th day of October, A. D. 1903.

Present: The honorable W. B. Gilbert, circuit judge; the honorable Erskine M. Ross, circuit judge, and the honorable Thomas P. Hawley, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
MONTANA LUMBER AND MANUFACTURING Company (a corporation), the Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants in error. } Writ of error to the district court of the United States for the district of Montana.

This cause having come on to be heard upon the pleadings and the bill of exceptions upon a writ of error whereby it is sought to review the judgment of the district court of the United States for the district of Montana in an action brought by the United States against the defendants in error to recover the sum of $15,000, the value of two million feet of lumber manufactured out of timber and logs which had been cut by the Montana Lumber and Manufacturing Company from unsurveyed Government lands situate within the district of Montana, and converted by the defendants in error to their own use and benefit;

2 And it appearing that the complaint in said action was filed on December 30, 1901; and that it alleged that on July 10, 1901, and long prior thereto, the plaintiff in error was the owner and entitled to the possession of the two million feet of lumber which it was alleged had been cut by the defendants in error, and that the said timber was cut from unsurveyed government lands, which, when the same shall have been surveyed, will be in township 26 north of range 34 west, Montana meridian, in the State and district of Montana; that on said 10th day of July, 1901, and while the plaintiff in error was so the owner of said lumber, the defendants in error wrongfully and unlawfully took possession of the same, disposed of and converted the same to their own use and benefit, to the damage of the plaintiff in error in the sum of $15,000, which is the value of said lumber; that to this complaint the Northern Pacific Railway Company filed its separate answer, denying the material

allegations of the complaint; that the other defendants in error made a joint answer likewise denying the material allegations of the complaint, but alleging by way of further answer and defense that although they cut timber from the premises mentioned in the complaint, all of said timber was cut from that portion of said township which will be, when surveyed, section 5, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was at the time of the cutting of said timber, by mesne conveyances from the Northern Pacific Railway Company, the owner of and entitled to the lands upon which said timber was growing at the time it was cut;

3 And it further appearing that upon the issues so joined the cause was tried before the court and a jury, and that it was proven that the land from which the timber was cut was within the limits of the Congressional grant to the Northern Pacific Railway Company was unoccupied public land and was wholly unsurveyed, and that the nearest Government survey is approximately twenty miles distant; that for the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of the plaintiff in error, permitted the Montana Lumber and Manufacturing Company to introduce evidence of a private survey of a portion of the township in question, made by one John K. Ashley, a civil engineer and surveyor, and that it was made by him in the year 1886 for the Northern Pacific Railway Company for the purpose of ascertaining the location of the railroad sections contained in said township, and to prove by other evidence that the timber cut by the Montana Lumber and Manufacturing Company was taken from what Ashley had designated and defined by means of his survey to be section 5 of said township; that after the defendants in error has rested their case, the plaintiff in error offered to prove in rebuttal by George F. Rigby, a surveyor and an engineer, a witness called on behalf of the United States, that he and another had made a survey of the same lands and that the Ashley survey was incorrect, and that section 5, as located by Ashley, had been placed three-quarters of a mile too far east; that the court refused to permit the witness to testify to these facts, and that thereupon the court instructed the jury to return a verdict for the defendants in error, on the ground that the United States had failed to prove its ownership of the land from which the timber was cut;

4 And it appearing that the rulings of the district court in admitting in evidence the testimony as to the Ashley survey, and in excluding the evidence offered by the plaintiff in error to rebut the same, and in directing the jury to return a verdict for the defendants in error on the ground above stated, are assigned as error; and

Whereas this court is divided in opinion upon the questions of law so presented, and another case involving similar questions is pending before this court on writ of error to the district court of the United States for the district of Montana, and a third case is pending before this court on writ of error to the circuit court of the United States for the eastern district of Washington, and it is of public importance that said questions be speedily and finally determined;

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination:

First. Did the district court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, when surveyed by the United States, section 5 of township 26 north of range 34 west, Montana meridian?

Second. Did the court err in excluding the evidence offered, on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

Third. Did the court err in instructing the jury to return a ver-
5 dict for the defendants in error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing four (4) pages, numbered from one (1) to four (4), inclusive, to be a true copy of an order this day entered in the foregoing-entitled cause certifying certain questions of law to the Supreme Court of the United States for its determination, as the same remains of record in my office.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 5th day of October, A. D. 1903.

[SEAL.] F. D. MONCKTON, *Clerk.*

a No. 941.

United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company (a corporation), the Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants in error.

Certified copy of printed transcript of record and order of submission.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

1 District court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company (a corporation), the Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Caption.

Be it remembered, on the 30th day of December, 1901, the plaintiff filed its complaint herein, which said complaint is in the words and figures following, to wit:

In the district court of the United States in and for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Complaint.

The plaintiff complains of the defendants and for cause of action alleges—

2 First. That the said defendant, Montana Manufacturing and Lumber Company, was at all the times hereinafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Montana and doing business within the State of Montana.

Second. That the Northern Pacific Railway Company is a corporation organized and existing under the laws of the State of Wisconsin, and doing business within the State and district of Montana.

Third. That on the 10th day of July, A. D. 1901, and for a long time prior thereto the plaintiff was the owner and entitled to the possession of two million feet (2,000,000) of lumber which had heretofore been manufactured out of timber and logs which had been cut from unsurveyed Government lands, which said lands, when the same shall have been surveyed, will be township twenty-six (26), north of range thirty-four (34), west of the Montana meridian, in the State and district of Montana.

Fourth. That on the 10th day of July, A. D. 1901, and while the plaintiff was so the owner of said lumber, the said defendants wrongfully and unlawfully took possession of the same and the whole thereof and wrongfully and unlawfully disposed of and converted the same to their own use and benefit to the damage of the plaintiff in the sum of fifteen thousand ($15,000) dollars.

3 Fifth. That the aggregate value of the said lumber was and is the sum of fifteen thousand ($15,000.00) dollars, and that the said sum and no part thereof has been paid.

Wherefore said plaintiff demands judgment against defendants, Montana Manufacturing and Lumber Company, Northern Pacific Railway Company, M. J. McConnell, and Alex Johnson, for the sum of fifteen thousand ($15,000.00) dollars, and costs of suit.

W. B. RODGERS,
United States Attorney.

UNITED STATES OF AMERICA,
District of Montana, ss:

William B. Rodgers, being first duly sworn on oath, deposes and says: That he is the regularly appointed, qualified, and acting United States attorney for the district of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the things and matters therein stated are true to the best of his knowledge, information, and belief

WILLIAM B. RODGERS.

Subscribed and sworn to before me this 30th day of December, A. D. 1901.

GEO. W. SPROULE,
Clerk U. S. Dist. Court, District of Montana.

(Endorsed:) Title of court and cause. Complaint. Filed and entered December 30th 1901. Geo. W. Sproule, clerk.

4 And thereafter, to wit, on the 30th day of December, 1901, a summons was duly issued herein, which said summons is as follows, to wit:

UNITED STATES OF AMERICA,
District Court of the United States, District of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUNACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Action brought in the said district court, and the complaint filed in the office of the clerk of said district court, in the city of Helena, county of Lewis and Clarke.

Summons.

The President of the United States of America, greeting, to the above-named defendants, Montana Manufacturing and Lumber Company (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson:

5 You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Hiram Knowles, judge of the United States district court, district of Montana, 30th day of December, in the year of our Lord one thousand nine hundred and one, and of our Independence, the 126th.

[SEAL.]

GEO. W. SPROULE, *Clerk.*
By F. H. DRAKE, *Deputy Clerk.*

(Endorsed:) Title of court and cause. Summons. W. B. Rodgers, plfs. attorney. Filed and entered Jan. 15th, 1902. Geo. W. Sproule, clerk.

6 And thereafter, to wit, on the 15th day of January, 1902, the defendant, Northern Pacific Railway Company, filed its separate answer herein, which said answer is as follows, to wit:

In the district court of the United States, in and for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER Company (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Answer of Northern Pacific Railway Company.

Now comes the defendant, Northern Pacific Railway Company, and for its separate answer to plaintiff's complaint—

I.

Admits the allegations of paragraphs first and second thereof.

II.

Denies each and every and all the allegations of paragraphs third and fourth thereof, each respectively.

7 III.

Wherefore defendant having fully answered, prays judgment for its costs.

WM. WALLACE, Jr.,
Attorney for defendant, Northern Pacific Railway Company.

UNITED STATES OF AMERICA,
State of Montana, county of Lewis and Clarke, ss:

Wm. Wallace, jr., being first duly sworn, makes oath and says:

I am an officer of the defendant corporation, Northern Pacific Railway Company, one of the defendants in the above-entitled action, to wit, its division counsel in Montana. That I have read the foregoing answer to plaintiff's complaint, and the facts and things therein stated are true to the best of my knowledge, information, and belief.

Further affiant saith not.

WM. WALLACE, Jr.

Subscribed and sworn to before me this 28th day of January, 1902.

[SEAL.] S. C. ASHBY,
Notary Public in and for Lewis & Clarke County, State of Montana.

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

WM. WALLACE, Jr.,
Attorney for defendant, Northern Pacific Railway Company.

8 (Endorsed:) Title of court and cause. Separate answer N. P. Ry. Co. Filed and entered Jan. 15th, 1902. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 3d day of February, 1902, the defendants, Montana Lumber and Manufacturing Company, O. J. McConnell and Alex Johnson, filed their answer herein, which is as follows, to wit:

In the district court of the United States, in and for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER Company (a corporation), Northern Pacific Rail- *tion*), *Northern Pacific Rail*-way Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Answer of Montana Lumber and Manufacturing Company.

Come now the defendants, the Montana Lumber and Manufacturing Company, O. J. McConnell and Alex Johnson, and for answer to the complaint of plaintiff on file herein—

I.

9 Admits the allegations in paragraphs 1 and 2 of the complaint herein, except that the name of this answering defendant corporation is the Montana Lumber and Manufacturing Company.

II.

Deny each and every other allegation in the said complaint contained.

And for further answer to the said complaint these defendants allege that it is true that at or about the time mentioned in the complaint these defendants cut timber from what would be township 26 north of range 34 west of Montana meridian, in the State and district of Montana, from which lumber was by them manufactured, but they allege that all of the lumber from which said lumber was manufactured by them was cut from that portion of said township which would be when surveyed section five of said township 26 north of range 34 west of Montana principal meridian, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was at the time of the cutting of said timber, by mesne conveyance from the said Northern Pacific Railway Company, the owner of and entitled to the possession of the land upon which the said timber was growing at the time the same was cut.

Wherefore, having fully answered the said complaint, defendants pray to be dismissed hence without day and recover of plaintiff their costs herein incurred.

CULLEN, DAY & CULLEN,
Attorneys for Ans. Defts.

10 UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, ss:

A. M. Holter, being first duly sworn, on oath deposes and says, that he is an officer of the defendant corporation, the Montana Lumber and Manufacturing Company, to wit, its president; that he has heard read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information, and belief.

A. M. HOLTER.

Subscribed and sworn to before me this 31st day of January, A. D. 1902.

C. P. SCHROEDER,
Notary Public in and for Lewis and Clarke County, State of Montana.

(Endorsed:) Title of court and cause. Answer of Montana M. L. Co. et al. Filed and entered Feb. 3d, 1902. Geo. W. Sproule, clerk.

11 And thereafter, to wit, on the 19th day of February, 1902, the plaintiff filed its replication herein, which said replication is as follows, to wit:

In the district court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), O. J. McConnell and Alex Johnson, defendants.

Replication.

Now comes the said plaintiff, the United States of America, and for replication to the answer of the said defendants, the Montana Lumber and Manufacturing Company, O. J. McConnell and Alex Johnson, filed herein:

1st. Denies that all or any of the timber from which said lumber was manufactured by them, or either of them, was cut from that portion of said township which would be when surveyed section five (5) of said township twenty-six (26) north of range 34 west of Montana principal meridian, or that the same is within the limits of the grant by act of Congress to the Northern Pacific Railway Company. Denies
12 that the said defendant, the Montana Lumber and Manufacturing Company, was at the time of the cutting of said timber or at any other time by mesne conveyance from the said Northern Pacific Railway Company, the owner of or entitled to the possession of the land upon which the said timber was growing at the time was cut, or at any time or at all.

Wherefore plaintiff demands judgment against said defendants as prayed for in its said complaint on file herein.

CARL RASCH,
Asst. U. S. Attorney.

UNITED STATES OF AMERICA,
District of Montana, ss:

Carl Rasch, being first duly sworn, deposes and says: That he is the regularly appointed, qualified, and acting assistant United States attorney; that he has read the foregoing replication and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

CARL RASCH.

Subscribed and sworn to before me this 19th day of February, A. D. 1902.

GEO. W. SPROULE,
Clerk U. S. Dist. Court, Dist. of Mont.

Service of copy of the foregoing replication acknowledged this 19th day of February, A. D. 1902.

_____ _____,
Attorneys for Defendants.

13 (Endorsed:) Title of court and cause. Replication. Filed and entered Feb. 19th, 1902. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 3d day of December, 1902, an order was duly made changing the names of the defendants, which said order is as follows, to wit:

District court of the United States, district of Montana.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY, Northern Pacific Railway Company, O. J. McConnell, and Alex Johnson, defendants.

Order to amend complaint, etc.

This cause came on regularly for trial at this time, Carl Rasch, United States attorney, appearing for the United States, and Messrs. Cullen, Day, and Cullen as attorneys for the Montana Lumber and Manufacturing Company, O. J. McConnell, and Alex Johnson, and Wm. Wallace, jr., appearing as attorney for the Northern Pacific Railway Company,
14 and thereupon, on motion of the United States attorney, plaintiff is hereby granted leave to amend its complaint herein by changing the names of the defendants to "Montana Lumber and Manufacturing Company" and O. J. McConnell, said defendants consenting to such change, and thereupon, the panel of jurors being incomplete, it is ordered that ten persons be summoned from the bystanders to appear as jurors to try this cause and a venire ordered issued returnable at 11 a. m.

Done in open court December 3d, 1902.

And thereafter, to wit, on the 3d day of December, 1902, a verdict was duly filed and entered herein, which said verdict is as follows, to wit:

District court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company (a corporation), Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Verdict.

We, the jury in the above-entitled cause, find in favor of the defendants under the instructions of the court.

Dated December 3d, 1902.

WILLIAM G. BAILEY, *Foreman.*

15 (Endorsed:) Title of court and cause. Verdict. Filed and entered Dec. 3d, 1902. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 4th day of December, 1902, a final judgment was filed and entered herein, which said judgment is as follows, to wit:

In the district court of the United States, for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company (a corporation), The Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Judgment on verdict.

This cause came on regularly for trial on the third day of December, 1902, Carl Rasch, esquire, appearing as counsel for plaintiff, William Wallace, jr., esquire, attorney for the defendant Northern Pacific Railway Company, and Messrs. Cullen, Day & Cullen, attorneys for the remaining defendants. A jury of twelve competent men was impaneled and sworn to try the cause. Witnesses on the part of the plaintiff and defendants were sworn and examined. The plaintiff and defend-
16 ant having rested their case, the defendants moved the court to instruct the jury to find for the defendants, which was done. Thereupon the jury retired to consider of their verdict, and returning into court answered to their names, and for their verdict say:

"We, the jury in the above-entitled cause, find in favor of the defendants under the instructions of the court.

"Dated December 3d, 1902.

(Signed) "WILLIAM G. BAILEY, *Foreman.*"

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff have nothing by this suit, and that the defendants do have and recover from the plaintiff their costs and disbursements incurred in this action taxed at the sum of dollars.

Dated December fourth, 1902.

Ent. Dec. 4, 1902.

GEO. W. SPROULE, *Clerk.*

Attest: A true copy.

GEO. W. SPROULE, *Clerk.*

District court of the United States, district of Montana. Title of cause. Judg. on verdict. Filed and entered Dec. 4th, 1902. Geo. W. Sproule, clerk.

17 District court of the United States, district of Montana.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY (a corporation), the Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Clerk's certificate to judgment roll.

I, Geo. W. Sproule, clerk of the district court of the United States for the district of Montana, do hereby certify that the foregoing papers hereto attached constitute the judgment roll in the above-entitled action.

Witness my hand and the seal of said court this 4th day of December, 1902.

GEO. W. SPROULE, *Clerk.*

(Endorsed:) Title of court and cause. Judg. roll. Filed and entered Dec. 4th, 1902. Geo. W. Sproule, clerk.

18 And thereafter, to wit, on the 2d day of January, 1903, the bill of exceptions herein was duly filed and allowed, which said bill of exceptions is as follows, to wit:

In the district court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Bill of exceptions.

Appearances: Carl Rasch, United States district attorney, for the Government; Cullen, Day & Cullen, attorneys for defendants Montana Lumber and Manufacturing Company, and M. J. McConnell and Alex Johnson; and William Wallace, jr., attorney for defendant Northern Pacific Railway Company.

19 In the district court of the United States, district of Montana

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Be it remembered that among the records and proceedings had and done in the above-entitled cause were the following, to wit:

On the 30th day of December, A. D. 1901, came the United States of America by William B. Rodgers, United States district attorney for the district of Montana, and filed in the above-entitled court its complaint against the Montana Lumber and Manufacturing Company, the Northern Pacific Railway Company, M. J. McConnell, and Alex Johnson, in words and figures following, to wit:

20 In the district court of the United States, in and for the district of Montana.

THE UNITED STATES OF AMERICA,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Complaint.

The plaintiff complains of the defendants, and for cause of action alleges:

First. That the said defendant, Montana Manufacturing and Lumber Company, was at all the times hereinafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Montana and doing business within the State of Montana.

Second. That the Northern Pacific Railway Company is a corporation organized and existing under the laws of the State of Wisconsin and doing business within the State and district of Montana.

Third. That on the 10th day of July, A. D. 1901, and for a long
21 time prior thereto, the plaintiff was the owner and entitled to the possession of two million feet (2,000,000) of lumber which had theretofore been manufactured out of timber, and logs which had been cut from unsurveyed Government lands, which said lands, when the same shall have been surveyed, will be township twenty-six (26), north of range thirty-four (34), west of the Montana meridian, in the State and district of Montana.

Fourth. That on the 10th day of July, A. D. 1901, and while the plaintiff was so the owner of said lumber, the said defendants, wrongfully and unlawfully, took possession of the same, and the whole thereof, and wrongfully and unlawfully disposed of and converted the same to their own use and benefit, to the damage of the plaintiff in the sum of fifteen thousand ($15,000) dollars.

Fifth. That the aggregate value of the said lumber was and is the sum of fifteen thousand ($15,000.00) dollars, and that the said sum and no part thereof has been paid.

Wherefore, said plaintiff demands judgment against defendants, Montana Manufacturing and Lumber Company, Northern Pacific Railway Company, M. J. McConnell, and Alex Johnson, for the sum of fifteen thousand ($15,000.00) dollars and costs of suit.

W. B. RODGERS,
United States Attorney.

22 UNITED STATES OF AMERICA,
District of Montana, ss:

William B. Rodgers, being first duly sworn, on oath deposes and says: That he is the regularly appointed, qualified, and acting United States attorney for the district of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the things and matters therein stated are true to the best of his knowledge, information, and belief.

WILLIAM B. RODGERS.

Subscribed and sworn to before me this 30th day of December, A. D. 1901.

GEO. W. SPROULE,
Clerk U. S. Dist. Court, District of Montana.

(Endorsed:) Title of court and cause. Complaint. Filed and entered December 30th, 1901. Geo. W. Sproule, clerk.

And thereafter, on January 29th, 1902, said defendant, the Northern Pacific Railway Company, filed its answer to said complaint in words and figures following, to wit:

23 In the district court of the United States in and for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Answer of Northern Pacific Railway Company.

Now comes the defendant, Northern Pacific Railway Company, and for its separate answer to plaintiff's complaint

I.

Admits the allegations of paragraphs first and second thereof.

II.

Denies each and every and all the allegations of paragraphs third and fourth thereof, each respectively.

III.

Wherefore, defendant having fully answered, prays judgment for its costs.

WM. WALLACE, Jr.
Attorney for Defendant Northern Pacific Railway Company.

24 UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, ss:

Wm. Wallace, jr., being first duly sworn, makes oath and says: I am an officer of the defendant corporation, Northern Pacific Railway Company, one of the defendants in the above-entitled action, to wit, its division counsel in Montana. That I have read the foregoing answer to plaintiff's complaint, and the facts and things therein stated are true to the best of my knowledge, information, and belief.

Further affiant saith not.

WM. WALLACE, Jr.

Subscribed and sworn to before me this 28th day of January, 1902.

[SEAL.] S. C. ASHBY,
Notary Public in and for Lewis and Clarke County, State of Montana.

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

WM. WALLACE, Jr.,
Attorney for Defendant Northern Pacific Railway Company.

(Endorsed:) Title of court and cause. Separate ans. N. P. Ry. Co. Filed and entered Jan. 15th, 1902. Geo. W. Sproule, clerk.

25 And thereafter, on February 3, 1902, said defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, filed their answer to said complaint in words and figures following, to wit:

In the district court of the United States in and for the district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), O. J. McConnell and Alex Johnson, defendants.

Answer of Montana Lumber and Manufacturing Company et al.

Come now the defendants, the Montana Lumber and Manufacturing Company, O. J. McConnell and Alex Johnson, and for answer to the complaint of plaintiff on file herein:

I.

Admits the allegations in paragraphs 1 and 2 of the complaint herein, except that the name of this answering defendant corporation is the Montana Lumber and Manufacturing Company.

II.

Deny each and every other allegation in the said complaint contained.

26 And for further answer to the said complaint these defendants allege that it is true that at or about the time mentioned in the complaint these defendants cut timber from what would be township 26 north of range 34 west of Montana meridian, in the State and district of Montana, from which lumber was by them manufactured; but they allege that all of the timber from which said lumber was manufactured by them was cut from that portion of said township which would be, when surveyed, section five of said township 26 north of range 34 west of Montana principal meridian, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant the Montana Lumber and Manufacturing Company was at the time of the cutting of said timber by mesne conveyance from the said Northern Pacific Railway Company, the owner of and entitled to the possession of the land upon which the said timber was growing at the time the same was cut.

Wherefore, having fully answered the said complaint, defendants pray to be dismissed hence without day, and recover of plaintiff their costs herein incurred.

CULLEN, DAY & CULLEN,
Attorneys for Ans. Defts.

27 UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, ss:

A. M. Holter, being first duly sworn, on oath deposes and says that he is an officer of the defendant corporation, the Montana Lumber and Manufacturing Company, to wit, its president; that he has heard read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information, and belief.

A. M. HOLTER.

Subscribed and sworn to before me this 31st day of January, A. D. 1902.

C. P. SCHROEDER,
Notary Public in and for Lewis and Clarke County, State of Montana.

(Endorsed:) Title of court and cause. Answer of Montana M. L. Co. et al. Filed and entered Feb. 3d, 1902. Geo. W. Sproule, clerk.

And thereafter, on February 19th, 1902, came the plaintiff and filed its replication to the new matter set up in said answer of the Montana

Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, in words and figures following, to wit:

28 In the district court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA MANUFACTURING AND LUMBER COMPANY (a corporation), Northern Pacific Railway Company (a corporation), O. J. McConnell, and Alex Johnson, defendants.

Replication.

Now comes the said plaintiff, the United States of America, and for replication to the answer of the said defendants, the Montana Lumber and Manufacturing Company, O. J. McConnell and Alex Johnson, filed herein:

1st. Denies that all or any of the timber from which said lumber was manufactured by them, or either of them, was cut from that portion of said township which would be, when surveyed, section five (5) of said township twenty-six (26), north of range 34, west of Montana principal meridian, or that the same is within the limits of the grant by act of Congress to the Northern Pacific Railway Company. Denies that the said defendant, the Montana Lumber and Manufacturing
29 Company, was at the time of the cutting of said timber, or at any other time, by mesne conveyance from the said Northern Pacific Railway Company, the owner of or entitled to the possession of the land upon which the said timber was growing at the time was cut, or at any other time, or at all.

Wher'fore plaintiff demands judgment against said defendants as prayed for in its said complaint on file herein.

CARL RASCH.

UNITED STATES OF AMERICA,
District of Montana, ss:

Carl Rasch, being first duly sworn, deposes and says: That he is the regularly appointed, qualified, and acting assistant United States attorney; that he has read the foregoing replication and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

CARL RASCH.

Subscribed and sworn to before me this 19th day of February, A. D. 1902.

GEO. W. SPROULE,
Clerk U. S. Dist. Court, Dist. of Mont.

Service of copy of the foregoing replication acknowledged this 19th day of February, A. D. 1902.

_____ _____,
Attorneys for Defendants.

(Endorsed:) Title of court and cause. Replication. Filed and entered Feb. 19th, 1902. Geo. W. Sproule, clerk.

30 And thereupon, the issues being joined, said cause came regularly on for trial on the 3d day of December, A. D. 1902, before the honorable Hiram Knowles, United States district judge, by a jury of the district of Montana for that purpose duly empaneled and sworn. At which date came also the said plaintiff and the said Montana Lumber and Manufacturing Company, the Northern Pacific Railway Company, M. J. McConnell, and Alex Johnson, the defendants, by their respective attorneys, and the jurors of the jury also came, and upon the trial of these issues the said United States of America to prove the issues on its part introduced the following testimony:

DARWIN J. CHADWICK, a witness called and sworn for and on behalf of the plaintiff, testified as follows:

Direct examination:

I reside at Missoula, and have resided there over four years. I am special agent of the General Land Office, and have been such special agent, at this time, since 1898. I have my main headquarters at Missoula. My principal business has been at Missoula and Kalispell, but I am subject to orders at any place wherever ordered by the Commissioner of the General Land Office or the Secretary of the Interior. The principal portion of the State of Montana under my supervision is especially the Missoula land district at the present time. I have had charge of that district as agent over five years. I was special agent, looking after the affairs of that district, in 1900 and 1901. I am acquainted with
31 township 26 north of range 34 west of the Montana meridian. It is located near the Idaho line in the extreme part of the Missoula County, in the Missoula land district, State of Montana. It is an unsurveyed township. I have known that township for three years or more; I have known of that land—that particular locality. The official survey has been extended, I think, to the east township 31. That is as far as the Government survey has been extended. This would be some 15 or 18 miles to the east. As to whether I know the defendants in this action, the Montana Lumber and Manufacturing Company, and Alex Johnson, and O. J. McConnell, I never met Mr. McConnell until yesterday. I met Mr. Johnson in the latter part of May or June, 1901. I met him at a sawmill on the extreme western line of Montana, about three miles west of Herron's Station on the Northern Pacific Railroad, where he had been carrying on the sawmill business. That would be, with reference to the lands described in the complaint, according to the survey if extended, in township 26 north of range 34 west. He had been carrying on, or was, as he said, operating and carrying on the sawmill business. As to how long these operations had been carried on in that particular township, I am familiar with it somewhat for three years, that that sawmill had been at that site. Mr. Johnson was operating there, cutting timber and manufacturing it into lumber, at the time I was there in 1901. There was a large quantity of lumber; I don't
32 know; it had all been cut on the specific tract of land as designated by the Montana Lumber and Manufacturing Company. Mr. Johnson said he had cut on the particular tract. I can only state that he said to me that he had cut about two million feet. There was a large quantity of lumber there, and he said they had cut about two million

feet. As to where this timber had been cut, as I stated, I only know from what he stated that he cut two million feet; he designated that he had cut two million feet from what would be section five. As to the township, it would be about three miles southwesterly from Herron, if the lines were properly extended, as the maps would indicate, it would be in township 26 north of range 34 west. As to the present value of lumber in that vicinity, by general information and having made inquiry, I learned it was $7.50, and I think Mr. Johnson said $7.50 was the value of the timber at the mill. The lumber was shipped out by the Northern Pacific Railroad. I made this investigation in June, I think, 1901. I had been over these lands before, a year or more before. There was cutting going on there at that time. There had been a mill carried on there for some years on this particular tract—two or three years.

Cross-examination by Mr. DAY:

I think I was first upon the land in controversy in January, 1899. I was at this sawmill in 1899. I don't recollect as to what the quantity of lumber would be that was there at that time. I was there
33 making a general investigation of the affairs of that whole township at that time. I understood that people claimed that they had a right to that section, so I did not make a very extended investigation of it. As to making any estimate of the lumber at that time, or the ground tha it had been cut from, the ground was, I should think, about a mile or pretty near that—the area of land cut from. As to any effort made at that time to ascertain how much timber had been cut, it was only as I would see the land, stumps, etc. As to how I knew this was township 26 north, of range 34 west, I would only know by the general map of Montana, sir. The sawmill was located within about a mile or a mile and a half of the Idaho line. It would be on the extreme northeastern part of the township, I think, if the lines were extended—northwestern. As to whether I made any effort to ascertain on what part of the section it was on if the lines were extended, it is impossible to do anything of that kind. By saying that it would be an impossibility to do so, I mean individually. I did not make any effort to ascertain. As to what effort I made to ascertain what township it was in, I would only know that by looking at the general map of Montana. I think it is about a mile and a half south, maybe a little more, from the line of the Northern Pacific Railroad. I think a mile and a half south. In my opinion it would be within the limits of the grant to the Northern Pacific Railroad. The next time I went there I went to the mill in June, 1901. As to how
34 much timber had been cut in the meanwhile, between the two visits, they had been cutting on other tracts as well, as I say the land was entirely unsurveyed. As to whether I am talking now about any particular tract of land, or am talking about the entire township in which these parties had been cutting, I refer to the township as it would be. I have no doubt it would be 26 north. I can't say how much had been cut from the entire township. I didn't make any effort to find out what had been cut from the entire township. There had been some scrip locations made in that township I have never had time to look at as yet. As to whether I made any effort to ascertain at all who owned the land from which the timber had been cut, in my knowledge of the situation

nobody owned the land—it belonged to the Government. As to whether or not the Government had disposed of this land to anybody, they couldn't dispose of it while it was unsurveyed—there is no process. I think that is a matter of law. As a matter of fact, I did make an investigation to determine whether or not this land had been disposed of by scrip, grant, or otherwise. I have examined the records so far as the scrip locations are concerned to see whether that had been designated on the official tract books of the Missoula land office. The only effort I made to ascertain the boundaries of these various scrip locations is what is shown on the tract books when I checked the locations; that is all there is to it.

35 I said I had talked with Johnson. As to whether Johnson told me when this timber had been cut, I think he said he had been carrying it on for a year or two. I think he said it had been cut during the fall and winter of the previous year; that would be 1900. I think some of the lumber that I saw there was cut in the fall of 1890. I don't know as to the rest of it. I remember that he said that he had cut about all the timber in that vicinity, and that they were going to move their mill to some other location, on to some scrip land that they claimed. As to who he said had cut the timber, well, he was the foreman, he was the manager; that is, so far as he could. I think he said he had a contract. As to his capacity, he said that he was cutting for Mr. McConnell, for the Montana Lumber and Manufacturing Company, as I recollect it. As to whether he told me that he cut for Mr. O. J. McConnell and the Montana Lumber and Manufacturing Company there in the fall of 1900, he said that he had been cutting and carrying on the business there. I do not know that he said especially as to when he had cut for them, he said that he had been carrying on the business, that he had cut it out and was going to move the mill. I asked him how much he had cut, and my recollection is he said about two million feet. He said it had been cut on what he claimed was section five. As to whether he pointed out to me the land from which the timber had been cut, the road showed as to which way the timber had been brought

36 in very largely. He did not show me any of the corners of what he claimed to be section five, and I never saw any. I never made any investigation to ascertain whether or not that would be section five, because it is unsurveyed land.

Cross-examination by Mr. WALLACE:

My recollection is that in this conversation I had with Mr. Johnson, I stated, I believe, in my direct examination, that he stated they had cut two million feet, or about two million feet. When asked by Mr. Day on cross-examination who he said did the cutting, I said he had been cutting for McConnell and the Montana Lumber and Manufacturing Company. He did not at that time claim to have been cutting for anybody else. That is the only conversation I ever had with Mr. Johnson on the subject that I remember of. I never went down and examined any of the corners or monuments upon the surveyed township 31, which is the last of the survey. I only know that by the records and plats in the land office. My knowledge was gleaned from some documents or records which I examined. I never saw any survey corners on any part of this ground I visited. I never tried or assisted in trying to establish on the surface of the earth any corners of or within what

would be township 26 of range 34, if surveyed, but I have been trying hard to get that township surveyed by the surveyor-general. I spent several days there getting applications to have the township surveyed. I never saw the lumber shipped out by the Northern Pacific Rail-
37 road Company. I haven't anything but Mr. Johnson's statement as to that.

Redirect examination:

I stated that Mr. Johnson stated to me that he was cutting this timber for O. J. McConnell and the Montana Lumber and Manufacturing Company. I took Mr. McConnell to be the manager of the company. I never met Mr. McConnell until yesterday.

GEORGE F. RIGBY, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination:

I reside at Carrolton, in Missoula County. I have resided there something over four years. Directly prior to that time I resided in Missoula. My business is surveyor and estimator of timber. I have followed that business since 1872. During the years 1898 until 1900 I was in the employ of the Northern Pacific land department—in 1899. I was assistant general timber inspector in looking after the timber in Montana wherever there was timber belonging to the Northern Pacific Railroad Company, and during that time I made one trip to township 26, north of range 34 west. That was in the winter of 1898 and 1899. I can not remember what month. The purpose of that trip was to look after their lands that they claimed there, to see what cutting had been done on them. I was as nearly on this particular township at that
38 time as I could locate it. There was cutting of timber going on on that township at that time. There was a sawmill there at that time. As I understood it, Mrs. Oman was doing the cutting. Mr. Oman, according to my information, had the contract to locate and remove that timber. Had the contract from the Montana Lumber and Manufacturing Company, and Mr. Oman had died recently and his wife was carrying on the business. I am not acquainted with the Montana Lumber and Manufacturing Company. I know of their operations in that part of the country. I was sent there to examine their operations at that time. I didn't ascertain how much timber they had been cutting at that time. They were cutting and hauling logs at that time, and hauling lumber away from it. I can not tell you how long that continued. I can't say that I am acquainted with the value or prices of lumber in that vicinity in the neighborhood of where this timber was cut.

Cross-examination by Mr. DAY:

I was sent by the Northern Pacific Railroad department or their chief inspector, W. F. Horton, at that time. It is my understanding that this section is within the limits of the Northern Pacific grant. It is in the vicinity of a mile or a mile and a half from the railroad in a southerly direction.

(At this time counsel for defendant, the Montana Lumber and Manufacturing Company, asked the following question:)

39 Q. Did you make any effort to ascertain from what section the timber was being cut?

(To which question counsel for the plaintiff then and there objected on the ground that it was incompetent, irrelevant, and immaterial, for the reason that the lands from which said timber had been cut were unsurveyed lands, and that no official survey had ever been made thereof, which said objection was by the court overruled, to which ruling of the court counsel for the plaintiff then and there duly excepted.)

A. (By the witness—continuing.) The efforts that I made were, I located it by the corner that was put in there by what was called the Northern Pacific survey.

(And thereupon counsel for the defendant, the Montana Lumber and Manufacturing Company, asked the following question:)

Q. What section would the land be?

(To which question counsel for the plaintiff then and there objected upon the same grounds as heretofore stated, and upon the further ground that it is not proper cross-examination, which objection was then and there overruled by the court, to which ruling of the court counsel for plaintiff then and there duly excepted.)

A. (By the witness—continuing.) They claimed it to be on section 5. From my investigation of the ground from which the cutting had taken place, I would say it was on section five by the Northern Pacific
40 survey. I did not make any estimate of what had been cut. Mrs. Oman was conducting the business at that time. That particular time when this was cut was in 1898 and 1899. I have been there since.

Redirect examination:

This claim that it was cut on what was claimed to be section five was based on a survey made, as I understand it, by the Northern Pacific land department. I made no other attempt to locate the ground myself, except to take the survey that they had. Mr. Horton, chief inspector for the Northern Pacific Railroad Company, instructed me to go there and look at section five. I found this particular tract of land designated as section five simply by the Northern Pacific survey. That survey, if I understand it, was made by the Northern Pacific land department. The means of identification there by which I could locate the particular tract referred to was just such survey as the United States puts in. I do not know by whom they have been put in. This township is an unsurveyed township. No official survey. I can not recollect how near is the official survey of the townships in that neighborhood. One township in the vicinity of Trout Creek, 15 or 18 miles from there.

Recross-examination by Mr. DAY:

As to the method by which I found the township being the same as the method by which I found the section markings, of course in a general way I knew where the township was. I had no other
41 means of ascertaining that you were on the township, except these markings on the ground and the map of the country.

Cross-examination by Mr. WALLACE:

I found all the corners of section five. My business there was to find out whether they had cut on any other lands, and at that time I determined by these means that the cutting was on section five. As to whether or not I found any township corners at all, I think the first corner I found was on the township line of the corner of section five. The four corners of section five were not the only surveyed corners that I found. I was down looking over the land to find out what cutting had been going on. I was there two or three times, and found numerous corners. I did not at that time make any effort to and did not find out the nearest Government corner upon the ground.

The plaintiff rests.

At this time counsel for the defendant, The Northern Pacific Railroad Company, moved for a nonsuit, which was then and there by the court granted, and the case dismissed as to the defendant, The Northern Pacific Railroad Company, and thereupon:

DANIEL ARMS, a witness called and sworn on behalf of the defendants, testified as follows:

I reside in Missoula. I am register of the land office of the Missoula land district. I have in my possession the classification of the
42 lands by the Mineral Land Commissioners upon and under the act of Congress relative to Northern Pacific lands embracing what would be section five, in township 26, north of range 34 west.

(At this time counsel for defendant, The Montana Lumber and Manufacturing Company, propounded the following question:)

Q. How has that land been classified?

(To which question counsel for the plaintiff then and there objected, upon the ground that it is incompetent, irrelevant, and immaterial, for the reason that until it is shown that the township in question has been legally sectionized by the official survey of the United States Government it is wholly immaterial as to whether the lands have been classified as mineral or nonmineral, which objection was by the court overruled, to which ruling of the court counsel then and there duly excepted.)

A. (By the witness—continuing:) It has been classified as nonmineral. I have the data on the classification here if you desire it.

And thereupon, counsel for the defendant, The Montana Lumber and Manufacturing Company, propounded the following question:

Q. What is the classification of township 26, north of range 34?

(To which question plaintiff then and there objected on the same grounds as theretofore stated in reference to evidence as to the classification of the lands in question, which objection was by the court overruled,
43 to which ruling of the court the plaintiff then and there duly excepted. And it was thereupon agreed that all evidence relative to the classification of the lands in question thereafter produced should be considered as having been admitted over the objection of counsel for plaintiff, which objection being overruled by the court, to which ruling of the court in admitting such evidence counsel for the plaintiff then and there duly excepted.)

A. (By the witness—continuing:) It has been classified as nonmineral—the entire township. I want to correct the statement I just made. I

stated the entire township was classified as nonmineral; it is just section five. The entire township is not classified as nonmineral. As to what portion of the township has been so classified, as we run the lines there would be—I can give you the sections classified as nonmineral: Sections 1, 2, 3, 4, and 5, seven to twelve, 13 to 18 inclusive. That is the north side of the township.

(Counsel for defendants at this time offered and there was admitted in evidence the exemplified copy of the line of definite location of the Northern Pacific Railroad involving the lands in question.)

JOHN K. ASHLEY, a witness called and sworn on behalf of the defendants, testified as follows:

I reside at San Point, Idaho. I am a civil engineer and surveyor. Have been engaged in that profession twenty-seven years. During that period of time I have been so engaged in Colorado, California,
44 New Mexico, Washington, Idaho, and Montana. I have worked for the Government of the United States. I worked as surveying contractor for ten or twelve or fifteen years in Colorado, New Mexico, and Washington and here. During that time it was my business to familiarize myself with the Government surveys. I was engaged in running lines—all different kinds of lines. I am familiar with the practice and survey of lines and monuments and markings on the ground. I was engaged in working for the Northern Pacific Railroad Company in 1886 and 1887. I worked for the company in different places, in Montana and in Washington. I am familiar with the land in controversy in this action, designated as township 26 north, of range 34 west. I have seen that land. I first saw it in November, 1886. I made a survey of that land. I made the survey in the month of November, 1886. I commenced my survey at the last or most western Government survey at Horse Plains at township 20 north, range 26 west. As to what I did towards the surveying of this land in question—township 26 north, of range 34 west—I began and ran a traverse line along the railroad; tied onto the corners in township 20, range 26, in order to show that my chain and coursings and calculations would fit in with the Government work. Then after passing the boundaries of township 20 north, range 26, I ran a traverse line up to Belknap, which is, according to my survey, in township 22, range 29 west. There I began and ran
45 according to the chain method of Government surveys almost to the State line, cutting out sections through the different townships, throwing out the mountains—just the valleys that were wooded—as the Government surveyors were in the habit of doing. The purpose of this survey was to find out the even and odd numbered sections, to find out the railroad sections. I was making the survey under the direct orders of Buckley, who was then general manager of the Northern Pacific Railroad Company.

(And thereupon, at this time, counsel for the defendant, the Montana Lumber and Manufacturing Company, propounded to the witness the following questions:)

Q. State whether or not on that occasion you surveyed what would be section 5, township 26 north, range 34 west.

(To which question plaintiff then and there duly objected, on the ground that it is incompetent, irrelevant, and immaterial, for the reason

that any private survey made by the witness in this case for the Northern Pacific Railroad Company would be of no legal effect whatever, and that any location or established location that he might have made by reason of such survey would be of no legal effect, and would not preclude the Government from maintaining this action. And on the further ground that until the survey has been officially made by the proper officers of the Government of the United States, and the expenses of such survey has been paid for the legal title to all these lands, even though
46 within the limits of the railroad grant, would be in the Government of the United States. Which objection the court then and there overruled; to which ruling of the court plaintiff then and there duly excepted.)

A. (By the witness, continuing:) Yes, sir.

And thereupon counsel for the defendants propounded to the witness the following question:

Q. You may detail, Mr. Ashley, the method of making such survey, together with the markings that were put upon the ground to identify the sections.

(To which question plaintiff then and there duly objected on the same ground as theretofore stated, which objection was by the court overruled; to which ruling of the court plaintiff then and there duly excepted. And it was thereupon agreed by and between the parties that all evidence thereafter introduced relative to the pretended survey by the witness for the Northern Pacific Railroad Company of township 26, north of range 34 west, or any part thereof, should be considered as having been admitted over the objection of the counsel for the plaintiff, which objection was then and there by the court overruled; to which ruling of the court plaintiff then and there duly excepted.)

A. (By the witness, continuing.) I described the point I started from. I followed up the railroad until I began to cut up the country into sections, then I followed the general order of doing the work as is done by the Government deputy; I did the markings at the order of Mr.
47 Buckley; I marked the corners just the same as if I had marked them on a Government survey. For instance, if I was to mark a corner of section 25 to 36, I would have a stake of the size usually put in or perhaps a little larger, marked with the section, township, and range, and on the sides facing the sections you would have the number of the sections on; in each section I would blaze a tree marking that, practically the same as I did the other, for a witness, or bearing trees as they were called. These markings were similar to these made by the Government surveyors. Made by the same instruments and the same way that the Government manual instructs its surveyors to do. I marked the section corners, quarter-section corners, and when I passed what was called the standard lines I would mark these. As to how the northeast corner of section 5, in township 26, north of range 34 west, would be marked, there would be a stake first hewed off on four sides; on the northeast side of the stake would be township 27 N., and the section, which would be 32 on the southeast side—you said northeast. Corner 5 is the northeast corner; it would be marked section 33; on the south side would be range 34 W., B. T., 34 W. S. 4; on the southwest side S. 5; on the southwest side S. 32. Four trees, one in each section,

marking off the section it was in. As to what blazing there would be on the trees, two blazes, about as high as wide, and about that high from the ground [indicating], that would be marked with the township
48 and range and section. Then there would be a lower blaze down near the root marked "B. T.," for "bearing tree." These marks were made with what we call a gouge. Not exactly a gouge, a little instrument with a hook on one side, which we stick in and turn. A metallic instrument. As to the section corners, we blazed the last very particularly and carefully, so that a person could follow them right along without an instrument. There were posts at the corners of the section, at the halfway points would be a post, marked "¼ S.," and two witness trees marked "¼ S. B. T." I surveyed almost the entire line from where I started to the Idaho line. As to how far on each side of the tract, sometimes I would go only a mile, the hills coming in close, and at other times we would go two or three miles from the tract. The purpose was to definitely locate the railroad land, so that the railroad company could cut tie timber. I believe the survey which I made was a very correct one. I used all the care I could use, knowing that I was going away from the survey, so that I was extra careful to get it right. As to whether I allowed for any variations in my instruments, my instruments were all in perfect adjustment. I took my meridian at least twice a week. I established my meridian by an observation polaris. I allowed on my calculations for the latitude. In making these calculations I used the same tables which are used by the Government surveyors. As to whether I have had occasion since then to observe by reason of the surveys of the Government as to whether or not the sur-
49 veys made by me in this vicinity were approximately correct, I have not been in Montana and have not made any examination of the Government surveys that have been made since in Montana. I made a sketch of the township showing the general surface. I made it in pencil; the paper I had got would not hold ink. I have got it here.

Cross-examination by Mr. RASCH:

I made this survey in November—the latter part of October and November, 1886. I made it at the instance of Mr. Buckley, general manager of the road. I was not in the employ of the Government at that time. I did the work by direction of the officers of the Northern Pacific Railroad Company. The measurements I took were for the purpose of establishing the odd sections which they claimed to be entitled to under the grant. The Northern Pacific Railroad Company was paying for it and they expected to get the benefit of it.

(At this time counsel for the plaintiff moved to strike out all the testimony given this witness concerning the establishment of this section five upon the ground heretofore stated, which motion the court then and there denied, to which ruling of the court the plaintiff then and there duly excepted.)

(By the witness—continuing.) The nearest point of the establishment Government survey from which I started in making these surveys at township 26, was thirty miles south and twenty-eight miles east. This is where the nearest point of the established survey was that I had
50 to rely on in making these surveys. I had to run a distance of twenty-eight miles east and thirty-six miles south before I got to

this particular township in question. As to how I ran these lines over that distance, I began there in township twenty and found the bearings of the line, took an observation polaris, and established a meridian, then with my instrument turned off an angle that the railroad made with that line and started with that; then I calculated by traverse the distances that I made north and west as I went along. I calculated them from the table of signs and cosigns. I located and defined particular tracts of land in the intermediate space from the Government survey that I started at to this township 26. I located tracts in the intermediate space. It took me about two months, I guess. In making this survey I cut out the mountains. The nature or contour of the country there, there was a valley almost level, that is, it is undulating—mountains on each side. Sometimes the mountains run back four or five miles, other times the railroad runs right close up to the mountains. As I stated, I extended my survey from one mile—sometimes I didn't even go on one side of the railroad—to three or four miles in width. I didn't attempt to locate all the ground embraced within the grant. I was not making for this particular township. I was making for all of it from Belknap to Herron siding. I confined myself to from one to three or four miles wide. There is a creek or river running through there. The bed of the creek and the bottom does not
51 form this valley that I spoke of. The Clark's Fork River runs through all this tract, and that river is not a very large river up there, but its banks are usually pretty high. Running back on each side of the river there would be a flat, or what you would call benches, sometimes that bench would be a mile or two miles back to the mountains. The mountains then rise abruptly. When I got to the mountains I quit. As to the contour of the country in this particular township involved in this case, on the north part of the township it is rolling—what I would call rolling. The southern part of the township is pretty rough. I didn't go into the southern part of it. This particular section which I claim to have established is in the northern part of that township. As to how it came that I had to cut out the mountains in making my survey, I left the mountains out. I didn't go on to them. That did not materially interfere with my survey. In places the valley would extend farther in, then the mountains would project and narrow down the valley. That didn't necessarily interfere with the regularity of my survey, I did not think so. Of course, we wanted portions of each township as we went along there. These mountains projected and receded so that sometimes full section, and sometimes quarter sections were left out. In that sense it was irregular. In some places I came to full sections cut out of the mountains, and in other places only a quarter section. I can't say that as a matter of fact these private surveys that are made by
52 parties hardly ever coincide with the Government lines as afterwards established, because when I was a Government surveyor I never paid any attention to these private surveys, and I don't suppose that these Government surveyors to-day do. As to whether, as a matter of fact, that lots of times when surveys of this kind are made by private parties they entirely miss lines afterwards established by the Government surveys; they may and may not. Of course, it is like this. You can take two sets of chainmen and let them measure a mile, and they won't get it the same. Their alignment will be all right, but the differ-

ence in chaining might make a difference in the lines. It is true that what is claimed here as section five under the Northern Pacific survey might, after the Government survey is made, be section four or six, or some other section. In the neighborhood of where this township is located there was a survey of an official character. No township lines; there was a State boundary between Idaho and Montana. That was surveyed at that time and definitely established. I don't know when it was definitely established, the corners were all in. As to whether I know of any survey that was made since I made my survey of this particular township, I know from the records in the surveyor-general's office and the Land Office that there has been other surveys, but I don't know anything about it. I don't know of any surveys made by Mr. Vogle. I didn't mean to say that this survey which I made there by means of which I located this section five, would
53 be exactly like the survey which would hereafter be made by the Government of the United States. Having gone over these distances of thirty and forty miles, such contingencies may arise, and such differences occur that the distances and odd-numbered sections, or even-numbered sections, may be reversed when the Government lines are established. It has happened. Any assumption that the Government survey when made will coincide with my survey, would not necessarily be based on the hypothesis that they would have to commence their survey at the point where I commenced mine. I ran clear through to the Idaho line. Supposing the Government would start making this survey from the Idaho line, the situation would be the same if they started in the same way that I did it. If they should start differently to commence with, of course, it would be entirely different. I terminated my survey about two miles from Herron's siding. I didn't terminate my survey at a Government corner, or attach it to a Government survey. I tied on to the State line, which is the Government survey, but, of course, I did not know at that time where that was; I knew of the corner that was there, and I afterwards found out from the boys.

Redirect examination by Mr. DAY:

The State line is not necessarily connected with the land lines of the Government of the United States; not at all. The Government survey is made from an entirely different basis from the State line. The
54 only reason I would tie onto a thing of that kind, is because the State lines are usually run correctly; by going south one hundred miles I might find where the land surveys are tied on that again, which would give me something to correct my surveys by.

G. W. SPARKS, a witness called for and on behalf of the defendants, testified as follows:

Direct examination by Mr. DAY:

I reside at Missoula. My business or profession is timber inspector. Have been engaged in that business since 1881. Fairly actively. Most of my work was done in Wisconsin. For the past six years have been doing inspecting in Montana. Some in the Blackfoot district. Well, you may say, in the western portion of the State. It is a part of my business in that capacity to examine the markings on the ground to

determine the locations of sections and townships of land that I am about to inspect for timber. I am familiar with the markings of surveys designating sections and townships. I am acquainted with the land in controversy, spoken of as section 5, township 26 north, range 34 west. I have been there various times. It is almost impossible for me to give the correct number of times; but various times. I was there first in April, 1900, about the middle, I should think, or about the 15th of April. I have been there frequently since. I have made an examination of that land to determine what markings of survey there was upon it.

55 (At this time counsel for the defendants propounded the following question to the witness:)

Q. Tell the jury what posts or monuments you found upon the land designating the township and section and range.

(To which question counsel for the plaintiff then and there duly objected on the ground that it was incompetent, irrelevant, and immaterial, for the reasons heretofore fully stated, which objection the court then and there overruled, to which ruling of the court the plaintiff then and there duly excepted.)

A. (Witness—continuing.) I found four corners and three quarter posts. The northeast corner of section five was the first corner that I found that I could read. The corner was a hemlock tree, blazed on four sides with each section marked on, and four witness trees, and I think these four witness trees were all hemlock. They were marked to show the bearings. The markings of these sections read just the same as it did on each one of the corners. That would be township 16, range 34 west, section 5—section 4, in township 27, north of range 34 west, section 32 and section 33. I mean township 26 instead of 16. The bearing trees had the markings to correspond with that section corner. Proceeding west along the line of the section I found a quarter post marked "1/4 sec. B. T." I found a northwest quarter post. That was marked also similar to the corner designated, only there was a stake

56 there. There were bearing trees. Coming down to the southwest corner, I found the southwest corner. It was properly marked and bearing tree in place. As to the southeast corner, the southeast corner was burned. I found the trees there, but I couldn't understand, of course. I made an effort to trace the lines as indicated by those posts. I know where the sawmill is situated that is sometimes spoken of as the Oman sawmill. With reference to the section lines, I would say that it was in section 8. The sawmill is in section 8. It is possibly thirty rods away from the section line of five. There is part of the lumber yard in section four. There had been timber cut at the time I was there. The timber had been cut in about a northwest direction from the sawmill. As to the land from which the timber was cut, it would be on section five. The land from which the timber was cut was within those lines of section five. They were not cutting any *any* timber there when I was there in that vicinity. At that time there was about, to the best of my judgement, may be 250,000 in the yard—all 2 x 4. That was all that was there at that time. I didn't make any estimate of what had been cut off of section five.

Cross-examination by Mr. RASCH:

I came to Montana in 1896. I say that I am a timber inspector. At the present time I inspect timber for any man that wants to hire me. That is my profession. As to how I happened to come to this particular township or section to inspect timber, at that time I was employed
57 by the Western Lumber Company. The sawmill which I found there on section eight was Mrs. Oman's, or Mr. Oman's. This was in April, 1900. I have been there frequently since then. I can't say by whom these corners that I spoke of had been placed there. I simply saw the corners there with the markings on them. I made no inquiry as to how they got there. As to whether I found the corners myself or whether they were pointed out to me—the first corner was described to me by Mr. Johnson. I can't say as to what he represented. As to this corner he represented that it was the southeast corner. That was the corner that I spoke of as being burnt so that I could not read the figures. That is the southeast corner of what is claimed to be section five. As to whether I was able to locate it from the description he had given me, I did after I went a mile north.

By the COURT. Q. Has there been any Government survey there?

A. No, sir.

Q. No Government survey?

A. No, sir.

ALEX JOHNSON, a witness called and sworn on behalf of defendants, testified as follows:

Direct examination by Mr. DAY:

I reside at Herron; am thirty-five years old; my business is the sawmill business at the present time; my sawmill is located in section 32, township 27, range 34. I am engaged there in sawing lumber. I know the Montana Lumber and Manufacturing Company. I never
58 worked for them. I know Mr. Charles Oman. He is dead. He died four years ago. I know this ground in controversy. The ground that has been talked about here from which this timber has been cut. I first saw this ground, I think, about ten years ago. I cut timber upon it. As to when I first went there to work, I was in charge of the mill after Oman died, which was in 1898. I am a brother-in-law of Mr. Oman. Mr. Oman was cutting timber there quite a while. He got a contract in 1895, I think. He was cutting timber in the winter of '95 and '96. He was cutting there at the time he died. After he died I stayed there at the sawmill. I stayed there until in 1900, then I bought in here. At the time he died the sawmill was on section eight. I have seen the section lines of this land that has been called section five. I seen three corners, the southeast corner and the northwest corner and the northeast corner. I heard the testimony of Mr. Ashley as to survey he made there and as to the location of the corners. I seen the corners which Mr. Ashley stated he located there, just the way he described them. The corners that I spoke of are the ones that he described; I guess there are now other survey corners on that land. There were not at that time. *vey corners on that land. There were not at that time.* He cut in the winter of '97 and '98 on section five, about one-half mile from

where my sawmill was, in a northwest direction. The amount cut there then in '97 and '98 was about sixteen or seventeen hundred thousand. I have cut off that land since '98. The timber I cut
59 there in '97 and '98 was shipped to Butte; some of it was shipped to Bonner. That which was shipped to Butte was shipped to the Montana Lumber and Manufacturing Company; that that was shipped to Bonner was cut by the Big Blackfoot Milling Company. We did not cut any in '98—'97 and '98. In '99 we did not cut any. In 1900 I cut some that was on land located by scrip. I cut on section five after the spring of '98. I cut that in 1901. I did not cut any on section eight during any of this time. After I came there I did not cut any at all on section eight.

Cross-examination by Mr. RASCH:

Mr. Oman died four years ago, in December, 1898. From that time on I had charge of the mill. The contract that I spoke of which Mr. Oman had, he had this contract with the Montana Lumber and Manufacturing Company. I did not continue on that contract operating from that time on until 1900. The last cutting we did was in '98. The last cutting we did for the Montana Lumber and Manufacturing Company was in '98. That cutting was done on section five. About seventeen thousand feet was cut. Prior to the time I took charge of this mill I was there at the place. I was then working—laboring for Mr. Oman. I said I noticed some other survey corners on section five. I can't say just exactly where it is, one corner of it. It was just a stake. Mr. Vogle had put it there the way I understood it. Mr. Vogle worked for the Big Blackfoot Milling Company. I was at Herron when he
60 put these stakes there. He said he established a survey there. As to whether the corners he made there as indicating the corners of section five were different from the corners that had been put there by other people, I would not say it was a corner. It was just a stake with numbers in pencil. A stake squared up on four sides. A small one a couple of inches through, marked in pencil.

Mr. O. J. MCCONNELL, a witness called and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. DAY:

I reside at Lothrop. My business or occupation is lumberman. I am connected or associated with the Montana Lumber and Manufacturing Company. I was assistant manager, secretary, and treasurer. I was connected with that company since its formation in '88. I was at all times assistant manager, and part of the time secretary and treasurer. The company was engaged in business in the State of Montana. Its principal office was in this city, in Helena. Its lumber yards in Helena and Butte. It is not in business. It ceased business actively in October, 1898. Its business was disposed of to the Big Blackfoot Milling Company. I am acquainted just in a general way with the land in controversy in this action spoken of as section five. I know where it is. I know there is such land over there. The Montana Lumber and Manufacturing Company received timber supposed to have been cut from

that land. That timber was cut under contract by Charles
61 Oman—that they had with Charles Oman. That is the contract which was entered into between the company and Mr. Oman. Under that contract we began to receive the timber in December, '98. We received nearly 1,707,000 feet. We never received any timber cut from that portion of the country by Mr. Johnson. We never received at any time any timber cut from that portion of the country from any other person other than under the Oman contract. We never had a contract with any other person.

(At this time counsel for the defendant, the Montana Lumber and Manufacturing Company, propounded to the witness the following question:)

Q. Prior to entering into this contract with Mr. Oman, what did you do with reference to the title of section five? Did you make any arrangement in regard to that?

(To which question counsel for the plaintiff then and there duly objected, on the ground that the same was incompetent, irrelevant, and immaterial, for the reasons hereinbefore stated, which objection was by the court overruled, to which ruling of the court the plaintiff then and there duly excepted.)

A. (Witness—continuing.) Yes, sir. About August, 1897, we made a contract with the Northern Pacific Railroad Company for the purchase of section five. That contract resulted in a deed.

Q. I would ask you to examine the paper marked "Defendant's Exhibit D"?

62 A. Yes, sir; that is all we obtained from the Northern Pacific Railroad Company.

By Mr. DAY. We offer in evidence the paper marked "Exhibit D," purporting to be a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company, dated the 7th day of November, 1898, for all of unsurveyed section 5, township 26 north, of range 34 west.

By Mr. RASCH. To which we object on the ground that it is incompetent, irrelevant, and immaterial, for the reason that the deed on its face shows the land attempted to be conveyed was unsurveyed lands of the public domain, that no official survey has been had of the township within which the tract designated in the deed is located; that, therefore, the conveyance attempted to be affected by this deed is absolutely void and of no legal efficacy or effect whatever.

By the COURT. I will admit that.

To which ruling of the court in permitting said deed to be admitted in evidence over the objection of counsel for the plaintiff, the plaintiff then and there duly excepted.

(By the witness—continuing:) The Montana Lumber and Manufacturing Company received no lumber from that portion of the township, except that cut under their own contract. Since the fall of '98, some was shipped in '99. Timber was cut in '98, shipped to the Big Blackfoot, after we had made our sale to them. That was all,
63 the seventeen hundred thousand feet which I have mentioned.

Cross-examination by Mr. RASCH:

Under the contract introduced in evidence we received seventeen hundred thousand feet of lumber which had been cut on what we claim to be section five. In other words, from the premises mentioned in the deed from the Northern Pacific Railroad to the Montana Lumber and Manufacturing Company. The greater portion of this lumber went to the Big Blackfoot Milling Company. We sold it when we sold our business to them.

Defendants rest.

And thereupon GEORGE F. RIGBY, called in rebuttal, on behalf of plaintiff, testified as follows:

Direct examination by Mr. RASCH:

I stated that my business was a surveyor. I estimate timber. As to whether I participated in a survey of this land in question, I was with the party that made the survey to make timber estimates of. The party that made the survey was the Big Blackfoot estimating party. I stated this morning that I am acquainted with the lines of the survey made by the Northern Pacific Railroad Company in that neighborhood.

(And thereupon counsel for plaintiff, the United States, propounded to the witness the following question:)

64 Q. State whether or not the survey which you made was over the same territory that had been prior thereto surveyed by the Northern Pacific Railroad Company.

(To which question counsel for the defendant, the Montana Lumber and Manufacturing Company, then and there objected on the ground that it was immaterial and irrelevant, which objection was then and there by the court sustained, to which ruling of the court in sustaining the objection of counsel for defendant, the plaintiff then and there duly excepted.)

(By the witness—continuing:) My survey extended over the northern portion of township 26 north, of range 34 west, the part that was supposed to be nonmineral.

(And thereupon counsel for plaintiff propounded to the witness the following question:)

Q. What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railroad Company?

(To which question counsel for the defendant, the Montana Lumber and Manufacturing Company, objected on the ground that it was incompetent, irrelevant, and immaterial, which objection was then and there by the court sustained, to which ruling of the court in sustaining said objection plaintiff then and there duly excepted.)

And thereupon counsel for plaintiff made the following offer of proof, and offered to show by the witness Rigby—

65 That a survey was made by him and one Vogle covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad heretofore testified to in the trial of this case. I furthermore offer to show by the witness Rigby that the survey made by him and Mr. Vogle showed that what had been established or located as section 5, township 26 north, of range

34 west, under the Northern Pacific survey, was not section five at all, but that section five was located three-fourths of a mile further west than it is designated and located by the Northern Pacific survey.

(To which offer of proof made by the plaintiff counsel for the defendants then and there objected on the ground that said evidence so offered was incompetent, irrelevant, and immaterial, which objection was then and there sustained by the court, to which ruling of the court in sustaining said objection plaintiff then and there duly excepted.

And thereupon the following proceedings were had:

By Mr. DAY. We now move the court to instruct the jury to find for the defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell, and Alex Johnson, for the reason that the land in controversy has been shown to belong to the defendant, the Montana Lumber and Manufacturing Company, and is not the property of the plaintiff in this action.

By the COURT. I will grant the motion on the ground that the Government has not shown that it was the owner of the lands from which the timber is cut. The Government has to prove its title the same as anybody else.

66 To which ruling of the court in granting the said motion to instruct the jury to find for the defendants, the plaintiff then and there duly accepted.

And now, within the time allowed by law and the rules of the court, and the orders of the court heretofore made in pursuance to the agreement of the plaintiff and defendants, the plaintiff herewith presents this, its bill of exceptions, containing all of the evidence in the cause, together with all of the exceptions taken and allowed in the trial of the cause, and asks that the same may be signed, sealed, and made a part of the record herein, and the same having been examined and found to be correct, it is hereby signed, sealed, settled, and allowed, this 26th day of January, A. D. 1903.

HIRAM KNOWLES, *Judge.*

Due service of the foregoing bill of exceptions, and receipt of copy thereof, is hereby acknowledged this 2d day of January, A. D. 1903.

CULLEN, DAY & CULLEN,
Attorneys for Defendants, Mont. Lumber and Mfg. Co., M. J. McConnell, and Alex Johnson.

WM. WALLACE, Jr.,
Attorneys for Defendant, N. P. Ry. Co.

67 It is hereby agreed that the within bill of exceptions is correct and may be signed, sealed, settled, and allowed as presented.

Dated this 2d day of January, A. D. 1903.

_____ _____,
Attorneys for defendants, Mont. Lumber and Mfg. Co., M. J. McConnell, and Alex Johnson.

_____ _____,
Attorney for defendant, N. P. Ry. Co.

(Endorsed:) Title of court and cause. Bill of exception. Filed and entered Jan 2d, 1903. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

And thereafter, to wit, on the 30th day of January, 1903, an assignment of errors was filed herein, which said assignment of errors is as follows, to wit:

In the district court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY (a corporation), Northern Pacific Railway (a corporation), M. J. McConnell, and Alex Johnson, defendants.

Assignment of errors.

68 Now comes the plaintiff in said above-entitled cause, and assigns the following as errors committed by the court on the trial of said cause, to wit:

I.

The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness George F. Rigby, upon the cross-examination, to wit:

"Q. Did you make any effort to ascertain from what section the timber was being cut?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. The efforts that I made were, I located it by the corner that was put in there by what was called the Northern Pacific survey."

II.

The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness George F. Rigby, upon his cross-examination, to wit:

"Q. What section would the land be?"

To which question the objection thereto having been by the court overruled, the witness answered:

"A. They claimed it to be on section 5. From my investigation of the ground from which the cutting had taken place, I would say it was on section five by the Northern Pacific survey. I did not make any estimate of what had been cut; Mrs. Oman was conducting the business at that time. That particular time when this was cut was in 1898 and 1899. I have been there since."

69 III.

The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness Daniel Arms, to wit:

"Q. How has that land been classified?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral. I have the data on the classification here if you desire it."

IV.

The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness Daniel Arms, to wit:

"Q. What is the classification of township 26, north of range 34?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral, the entire township. I want to correct the statement I just made. I state the entire township was classified as nonmineral; it is just section five. The entire township is not classified as nonmineral. As to what portion of the entire township has been so classified, as we run the lines, there would be—I can give you the sections classified as nonmineral—sections 1, 2, 3, 4, and 5, seven to twelve, 13 to 18, inclusive; that is the north side of the township."

V.

70 The court erred in overruling the objection of counsel for plaintiff to the following question of the witness John K. Ashley, to wit:

"Q. State whether or not on that occasion you surveyed what would be section 5, township 26 north, range 34 west."

To which question, the objections thereto having been by the court overruled, the witness answered:

"A. Yes, sir."

VI.

The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness John K. Ashley, to wit:

"Q. You may detail, Mr. Ashley, the method of making such survey, together with the markings that were put upon the ground to identify the sections."

To which question, the objection thereto having been by the court overruled, the witness answered in substance as follows:

"A. I described the point I started from. I followed up the railroad until I began to cut up the country into sections, then followed the general order of doing work as is done by the Government deputies. I did the marking at the order of Mr. Buckley, and marked the corners just the same as if I had marked them on a Government survey. These markings were similar to those made by a Government surveyor; made by the same instruments and the same way that the Government manual instructs its surveyors to do. I marked the section corners, quarter section corners, and when I passed what was called the standard lines I would mark those. As to the section corners, we blazed them,
71 very particularly and carefully, so that a person could follow them right along without an instrument. The purpose was to definitely locate the railroad land so that the railroad could cut the timber. I believe the survey which I made was a very correct one. I used all the care I could use. My instruments were all in perfect adjustment. I took my meridian at least twice a week, and I allowed on my calculations for the latitude. In making these calculations I used the same tables which are used by the Government surveyors."

VII.

The court erred in denying the motion of counsel for plaintiff to strike out all of the testimony of the witness John K. Ashley given over the objection of counsel for plaintiff concerning the establishment by him of section five, township twenty-six, north of range thirty-four west, said testimony being in substance that in 1886 and 1887 the witness worked for the Northern Pacific Railroad Company in Montana, and during that time made a survey of township twenty-six, north of range thirty-four west, for the Northern Pacific Railroad Company for the purpose of ascertaining the even and odd numbered sections and to find out the railroad sections in said township; that the said survey was made under the orders of the general manager of the railroad company and for the benefit of the said railroad company. That on that occasion witness surveyed what would be section five of township twenty-six, north of range thirty-four west, established the corners of said section five and marked the same.

72 Said motion to strike out the said testimony having been made by counsel for plaintiff upon the ground that the same was incompetent, irrelevant, and immaterial for the reason that the said township being unsurveyed lands, any private survey made by the witness for the Northern Pacific Railroad Company was of no legal effect whatever, and that any location that the witness might have made by reason of such survey would be of no legal effect and would not preclude the Government from maintaining this action. And on the further ground that until the survey has been officially made by the proper officers of the Government and the expenses of such survey had been paid for the legal title to the lands in question in said cause, even though within the limits of the railroad grant, would be in the Government of the United States.

VIII.

The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness G. W. Sparks concerning what was claimed to be section five, township twenty-six north, range thirty-four west, to wit:

"Q. Tell the jury what posts or monuments you found upon the land designating the township and section and range."

To the question, the objection having been by the court overruled, the witness in substance answered as follows:

"A. I found four corners and three quarter posts. The northeast corner of section five was the first corner that I found that I could

73 read. The corner was a hemlock tree, blazed on four sides with each section marked on, and four witness trees, and I think these four witness trees were all hemlock. They were marked to show the bearings. The markings of these sections read just the same as it did on each one of the corners. Proceeding west along the line of the section, I found a quarter post marked 1/4 sec. B. T. I found a northwest quarter post. That was also marked similar to the corner described, only there was a stake there. There were bearing trees. Coming down to the southwest corner, I found a southwest corner. It was properly marked and bearing tree in

place. As to the southeast corner, the southeast corner was burned. I found the trees there. I made an effort to trace the lines as indicated by those posts."

IX.

The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness O. J. McConnell, relative to what was claimed to be section five, township 26 north, range thirty-four west, to wit:

"Q. Prior to entering into the contract with Mr. Oman, what did you do with reference to the title of section five? Did you make any arrangements as to that?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. Yes, sir. About August, 1897, we made a contract with the Northern Pacific Railroad Company for the purchase of section five. That contract resulted in a deed."

74

X.

The court erred in admitting in evidence, over the objection of counsel for plaintiff, a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company, the said deed being dated the 7th day of November, 1898, and being for all of unsurveyed section 5, township 26, north of range 34 west.

XI.

The court erred in sustaining the objection of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of the witness George F. Rigby, a surveyor, to wit:

"Q. State whether or not the survey which you made was over the same territory that had been prior thereto surveyed by the Northern Pacific Railroad Company."

In answer to which question the witness Rigby, if permitted to do so, would have answered that the survey made by him, referred to in the question, was over the same territory and covered the same ground as that which had been surveyed prior thereto by the Northern Pacific Railroad Company.

XII.

The court erred in sustaining the objection of counsel for the defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of George F. Rigby, a surveyor, to wit:

75 "Q. What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railroad Company?"

In answer to which question, if he had been permitted to do so, the witness would have stated that the survey made by him did not conform to

the survey made by the Northern Pacific Railroad Company, but that according to the survey made by him the lines defined by the Northern Pacific Railroad survey were located three-fourths of a mile east of where they should have been located.

XIII.

The court erred in sustaining the objection of counsel for the defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the offer of counsel for plaintiff, the United States of America, to prove by the witness George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel, covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company, theretofore testified to in the trial of the case, and to prove by said witness Rigby that the survey made by him and the said Vogel showed that what had been established or located as section 5, township 26, north of range 34 west, under the Northern Pacific survey, was not section 5 at all, but that section five was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

76 XIV.

The court erred in refusing to allow plaintiff to prove in rebuttal, by the witness George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company, theretofore testified to in the trial of this case, and that the said survey so made by said witness and Vogel, showed that what had been established or located as section 5, township 26, north of range 34 west, under the Northern Pacific survey, was not section 5 at all, but that section 5 was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

XV.

The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said cause, to instruct the jury to return a verdict in favor of said defendants.

XVI.

The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said case, to instruct the jury to return a verdict in favor of the said defendants upon the ground that the Government had not shown that it was the owner of the lands from which the timber was cut.

77 Wherefore, the plaintiff prays that the judgment rendered in this cause may be reversed, set aside, and held for naught.

CARL RASCH,
United States Attorney.

Service of the foregoing assignment of errors and receipt of a copy thereof acknowledged and admitted this 30th day of January, A. D. 1903.

CULLEN, DAY & CULLEN,
Attorneys for Montana Lumber and Manufacturing Co., M. J. McConnell and Alex. Johnson.
WM. WALLACE, Jr.,
Attorney for Northern Pacific Railway Company.

(Endorsed:) Title of court and cause. Assignment of errors. Filed Jan. 30th, 1903. Geo. W. Sproule, clerk.

78 And thereafter, to wit, on the 30th day of January, 1903, a petition for writ of error and order allowing same were filed herein, which said petition and order are as follows, to wit:

In the district court of the United States, district of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONTANA LUMBER AND MANUFACTURING COMPANY (a corporation), Northern Pacific Railway Company (a corporation), M. J. McConnell and Alex. Johnson, defendants.

Petition for writ of error and order allowing same.

To the honorable the judge of the district court of the United States in and for the district of Montana:

Comes now your petitioner, the United States of America, the plaintiff in said above-entitled cause, by Carl Rasch, United States district attorney for the district of Montana, and feeling itself aggrieved by the verdict of the jury and the judgment entered on the 4th day of December, A. D. 1902, respectfully represents that in the records, proceedings, and also in the rendition of the judgment in the above-entitled cause which
79 is in the said district court before you, manifest error hath happened in the matters and things in your petitioner's bill of exceptions and its assignment of errors filed herein, more specifically set forth, to the great injury and damage of your petitioner, the said plaintiff in said cause.

Therefore, your petitioner prays that it may please your honor to grant unto your petitioner a writ of error to remove the said cause, and the record thereof, into the United States circuit court of appeals for the ninth circuit, to the end that the error, if any hath happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner will ever pray.

CARL RASCH,
United States Attorney for the District of Montana.

Upon motion of Carl Rasch, United States attorney for the district of Montana, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and the same is hereby,

allowed to have review in the United States circuit court of appeals for the ninth circuit the judgment heretofore entered herein.

Dated this 30th day of January, A. D. 1903.

HIRAM KNOWLES,
Judge of the District Court of the United States, District of Montana.

(Endorsed:) Title of court and cause. Petition for writ of error. Filed Jan. 30, 1903. Geo. W. Sproule, clerk.

80 And thereafter, to wit, on the 30th day of January, 1903, a writ of error was duly issued, which said writ is as follows, to wit:

Writ of error.

UNITED STATES OF AMERICA, ss.

The President of the United States of America to the honorable Hiram Knowles, judge of the United States district court for the district of Montana, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court, before you, between the United States of America, plaintiff in error, and the Montana Lumber and Manufacturing Company, a corporation, the Northern Pacific Railway Company, a corporation, M. J. McConnell and Alex. Johnson, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, the United States of America, as is said and appears by its petition herein.

We, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, in the State of California, together with this writ,

81 so as to have the same at the said place in said circuit on the 1st day of March, A. D. 1903, that the records and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of January, A. D. 1903.

Attest my hand and the seal of the United States district court for the district of Montana, at the clerk's office at Helena, Montana, on the day and year last above written.

[SEAL.] GEO. W. SPROULE,
Clerk, United States District Court, District of Montana.

The above and foregoing writ of error is hereby allowed.

HIRAM KNOWLES,
United States District Judge.

Service of foregoing writ of error and receipt of copy acknowledged and admitted this 30th day of January, A. D. 1903.

CULLEN, DAY & CULLEN,
Attorneys for Montana Lumber and Manufacturing Company, M. J. McConnell and Alex. Johnson.

WM. WALLACE, JR.,
Attorney for Northern Pacific Railway Company.

82 *The answer of the honorable Hiram Knowles, United States district judge for the district of Montana, to the foregoing writ.*

The records and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said district court, to the United States circuit court of appeals for the ninth circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within I am commanded.

By the court.
[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 90. United States circuit court of appeals, ninth circuit. The United States of America, plaintiff in error, vs. Montana Lumber and Manufacturing Company, a corporation, Northern Pacific Railway Company, a corporation, M. J. McConnell, and Alex. Johnson, defendants in error. Writ of error. Filed and entered Jan. 30, 1903. Geo. W. Sproule, clerk. Carl Rasch, U. S. attorney.

And thereafter, to wit, on the 30th day of January, 1903, citation duly issued, which said citation is as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

83 The President of the United States of America to the Montana Lumber and Manufacturing Company, the Northern Pacific Railway Company, M. J. McConnell, and Alex. Johnson, greeting:

You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Montana, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Hiram Knowles, judge of the United States district court for the district of Montana, this 30th day of January, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh.

[SEAL.] HIRAM KNOWLES,
United States District Judge.

Attest: GEO. W. SPROULE, *Clerk.*

Service of the foregoing citation and receipt of copy thereof acknowledged and admitted this 30th day of January, A. D. 1903.

CULLEN, DAY & CULLEN,
Attorneys for Montana Lumber and Manufacturing Company, M. J. McConnell, and Alex. Johnson.

WM. WALLACE, Jr.,
Attorney for Northern Pacific Railway Company.

84 (Endorsed:) No. 90. United States circuit court of appeals, ninth circuit. The United States of America, plaintiff in error, vs. Montana Lumber and Manufacturing Company, a corporation, Northern Pacific Railway Company, a corporation, M. J. McConnell, and Alex. Johnson, defendants in error. Citation. Filed and entered Jan. 30, 1903. Geo. W. Sproule, clerk.

Clerk's certificate to transcript.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, George W. Sproule, clerk of the United States district court, district of Montana, do hereby certify and return to the honorable the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 94 pages, numbered consecutively from 1 to 94, is a true and correct transcript of the pleadings, process, orders, judgment, and other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error with proof of service thereof.

I further certify that the costs of the transcript of record amount to the sum of forty-four and 80-100 dollars ($44.80), and have been made a charge against the United States, the plaintiff in error.

85 In witness whereof I have hereunto set my hand and affixed the seal of the said United States district court for the district of Montana, at Helena, Montana, this 10th day of February, A. D. 1903.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 941. United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. The Montana Lumber and Manufacturing Company, a corporation, the Northern Pacific Railway Company, a corporation, M. J. McConnell, and Alex. Johnson, defendants in error. Transcript of record. Upon writ of error to the United States district court for the district of Montana.

Filed February 16th, 1903.

F. D. MONCKTON, *Clerk.*

86 At a stated term, to wit, the October term, A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Wednesday, the thirteenth day of May, in the year of our Lord one thousand nine hundred and three.

Present: The honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company, a corporation, et al., defendants in error. } No. 941.

Order of submission.

Ordered, cause argued by Carl Rasch, esquire, United States attorney, and E. C. Day, esquire, counsel for the defendants in error, and submitted to the court for consideration and decision, with leave to Mr. Day to file a reply-brief and with leave to Mr. Rasch to reply thereto.

87 In the United States circuit court of appeals, for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE MONTANA LUMBER AND MANUFACTURING Company, a corporation, the Northern Pacific Railway company, a corporation, M. J. McConnell and Alex Johnson, defendants in error. } No. 941.

Certificate of Clerk C. C. A. to transcript of record and order of submission.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, at the direction of the honorable the judges thereof, do hereby certify the foregoing eighty-six (86) pages, numbered from one (1) to eighty-six (86), inclusive, to be a true copy of the printed transcript of record and of the order of submission in the above-entitled cause as the same remain of record in my office.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 5th day of October, A. D. 1903.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Indorsed:) Received Oct. 10, 1903. Office of the clerk Supreme Court U. S.

(Indorsement on cover:) File No. 19089. U. S. circuit court of appeals, 9th circuit. Term No. 438. The United States of America *vs.* The Montana Lumber and Manufacturing Company, the Northern Pacific Railway Co., et al. Certificate filed October 10th, 1903. File No. 19089.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 2 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES OF AMERICA
v.
THE MONTANA LUMBER AND MANUFACTURING COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, et al. } No. 425.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES OF AMERICA
v.
THE MONTANA LUMBER AND MANUFACTURING COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, et al. } No. 438.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States of America, respectfully moves the court to advance the above-entitled case for hearing at the present term of the court; and for grounds of motion respectfully assigns the following:

The Government sued the defendants to recover $15,000, the value of 2,000,000 feet of timber taken from unsurveyed Government lands in the district of Montana which, when surveyed, will be T. 26 N., R. 34 W., Montana land district, and converted by the defendants. The defendant railway company answered separately, denying the material

allegations of the complaint. The other defendants answered jointly, likewise denying the material allegations of the complaint and alleging, by way of further defense, that although they cut timber from the premises mentioned, it was cut from that portion of said township which will, when surveyed, be section 5, which section is within the limits of the grant to the Northern Pacific Railway Company, and that the defendant lumber company was, at the time of cutting, by mesne conveyances from the railway company, the owner of said section 5.

The trial court, over objections of plaintiff, permitted the defendants to introduce evidence of a private survey and to prove by other evidence that the timber was taken from lands which the said private survey showed to be in said section 5. The Government offered to prove in rebuttal, by an engineer, that said private survey was incorrect, but the court refused to permit the witness so to testify, and thereupon directed a verdict for defendants on the ground that the Government failed to prove its ownership of the lands in question.

The circuit court of appeals certifies to this court for determination the correctness of the action of the trial court in admitting said evidence of the defendant, in excluding the testimony in rebuttal offered by the Government, and in directing a verdict for defendants, the circuit court of appeals being divided upon these questions.

Following is an extract from the certificate of the said circuit court of appeals, showing the importance of advancing the case in this court:

> Whereas this court is divided in opinion upon the questions of law so presented, and another case involving similar questions is pending before this court on writ of error to the district court of the United States for the district of Montana, and a third case is pending before this court on writ of error to the circuit court of the United States for the eastern district of Washington, and it is of public importance that said questions be speedily and finally determined, it is ordered, etc.

It is suggested to the court that the case, if advanced, be assigned for hearing on or about January 4, 1904.

HENRY M. HOYT,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
THE MONTANA LUMBER AND MANUFACTURING COMPANY, The Northern Pacific Railway Company, et al. } No. 125.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was instituted by the United States, in the District Court of the United States in and for the district of Montana, against the defendants to recover the sum of $15,000, the value of 2,000,000 feet of lumber manufactured out of timber and logs which had been cut from unsurveyed Government lands, situated within the district of Montana, and converted by the defendants to their own use and benefit.

The complaint in said action was filed on December 30, 1901, and it is therein alleged that on the 10th day of July, A. D. 1901, and long prior thereto, the plaintiff was the owner and entitled to the possession of 2,000,000

feet of lumber, which had theretofore been manufactured out of timber and logs cut from unsurveyed Government lands, which, when the same shall have been surveyed, will be township 26 north, of range 34 west, of the Montana meridian in the State and district of Montana. That on the said 10th day of July, A. D. 1901, and while the plaintiff was so the owner of said lumber, the defendants wrongfully and unlawfully took possession of the same, disposed of and converted said lumber to their own use and benefit to plaintiff's damage in the sum of $15,000

To this complaint the Northern Pacific Railway Company, on January 29, 1902, filed its separate answer, and, admitting its corporate existence and the corporate existence of the Montana Lumber and Manufacturing Company, denied each and every other allegation of the complaint.

On February 3, 1902, the Montana Lumber and Manufacturing Company, O. J. McConnell, and Alex. Johnson filed their joint answer, in which, after admitting the corporate existence of the defendant corporation and denying each and every other allegation in the complaint contained, they alleged by way of further answer and defense the truth of the fact that at or about the time mentioned in the complaint they cut timber from the premises mentioned and described in said complaint, but that all of the timber from which said lumber was manufactured by them was cut from that portion of said township which would be when surveyed section 5 of said township; that said section

is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was, at the time of the cutting of said timber, by mesne conveyances from the Northern Pacific Railway, the owner of and entitled to the possession of the lands upon which the timber was growing at the time it was cut.

To the answer of the Montana Lumber and Manufacturing Company, McConnell, and Johnson, the Government, on the 19th day of February, filed its replication, denying specifically each and every allegation contained in the affirmative matter and defense set up in said answer.

The case came on for trial on December 3, 1902, before the court and a jury. There was no evidence adduced by the plaintiff connecting the Northern Pacific Railway Company with the taking and conversion of the lumber involved in the case, and, upon motion, the case as to that corporation was dismissed.

The evidence shows that township 26, north of range 34 west, described in the complaint, and from which the timber was cut, is wholly unsurveyed, but is situated within the limits of the Congressional grant to the Northern Pacific Railway Company. The nearest Government survey at this time is approximately 20 miles distant. (Transcript, pp. 17–18.)

For the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of counsel for the plaintiff, permitted the

defendant, the Montana Lumber and Manufacturing Company, to introduce evidence of a private survey of a portion of the township in question by one John K. Ashley, civil engineer and surveyor, made by him in 1886 for the Northern Pacific Railroad Company, for the purpose of ascertaining the location of the railroad sections contained in said township, which was supplemented by further evidence that the timber cut by the defendant, the Montana Lumber and Manufacturing Company, was taken from what Ashley had designated and defined, by means of his survey, as section 5 of said township.

As to the manner in which he had made this survey, Mr. Ashley testified that he commenced the same at the last or most western Government survey, at Horse Plains, a distance of 28 miles east of the township in question in this case, and thence running a distance of 28 miles west and 36 miles south of township 26 and on to the State line, cutting out sections through the different townships throughout the mountains, confining himself to the valleys that were wooded. That upon that occasion he surveyed what would be section 5, township 26 north, range 34 west, detailing in particular the method of operation and the markings made by him upon the ground to identify the sections. Upon the conclusion of the witness Ashley's direct examination, counsel for the Government moved to strike out all the testimony given by the witness concerning the survey and establishment by him of section 5 of the unsurveyed township in question, which the court

overruled, to which ruling an exception was taken. (Transcript, p. 25.)

On cross-examination the witness Ashley testified and admitted that surveys of the kind made by him might entirely miss the lines afterwards established by the Government surveys; that two sets of chainmen measuring a mile would not get it the same; that the difference in chaining might make a difference in the lines; that it was true that what was claimed in this case as section 5, under the Northern Pacific survey, might, after the Government's survey is made, be section 4 or 6, or some other section. The court also admitted in evidence, over the objection of counsel for plaintiff, a paper purporting to be a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company for all of *unsurveyed section* 5, township 26, north of range 34 west. To this ruling counsel for plaintiff excepted. (Transcript, p. 31.)

Thereupon, and after the defendants had rested, the plaintiff offered to prove, in rebuttal, by George F. Rigby, a surveyor and engineer, that he and one Vogel had made a survey of the same lands covered by the survey made by Mr. Ashley for the Northern Pacific Railroad Company, that the Ashley survey was incorrect, and that, according to the Rigby survey, the location of section 5 of the township in question as made by Ashley had been placed three-quarters of a mile too far east. The court refused to permit the

witness to testify to these facts, and thereupon instructed the jury to return a verdict for the defendants, on the ground that the Government had failed to prove its ownership of the land from which the timber was cut, to which ruling counsel for plaintiff then and there and before the jury retired, duly excepted. (Transcript, p. 33.)

The Government sued out a writ of error from the Circuit Court of Appeals for the Ninth Circuit in order to have the cause reviewed by said court. The assignment of errors was as follows:

> I. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness, George F. Rigby, upon the cross-examination, to wit:
>
> "Q. Did you make any effort to ascertain from what section the timber was being cut?"
>
> To which question, the objection thereto having been by the court overruled, the witness answered:
>
> "A. The efforts that I made were, I located it by the corner that was put in there by what was called the Northern Pacific survey."
>
> II. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, George F. Rigby, upon his cross-examination, to wit:
>
> "Q. What section would the land be?"
>
> To which question, the objection thereto having been by the court overruled, the witness answered:
>
> "A. They claim it to be on section 5. From my investigation of the ground from which the

cutting had taken place, I would say it was on section five by the Northern Pacific survey. I did not make any estimate of what had been cut. Mrs. Oman was conducting the business at that time. That particular time when this was cut was in 1898 and 1899. I have been there since."

III. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, Daniel Arms, to wit:

"Q. How has that land been classified?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral. I have the data on the classification here if you desire it."

IV. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, Daniel Arms, to wit:

"Q. What is the classification of township 26, north of range 34?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral, the entire township. I want to correct the statement I just made. I state the entire township was classified as nonmineral; it is just section five. The entire township is not classified as nonmineral. As to what portion of the entire township has been so classified, as we run the

lines there would be—I can give you the sections classified as nonmineral. Sections 1, 2, 3, 4, and 5, seven to twelve, 13 to 18, inclusive. That is the north side of the township."

V. The court erred in overruling the objection of counsel for plaintiff to the following question of the witness, John K. Ashley, to wit:

"Q. State whether or not on that occasion you surveyed what would be section 5, township 26 north, range 34 west."

To which question, the objections thereto having been by the court overruled, the witness answered:

"A. Yes, sir."

VI. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness, John K. Ashley, to wit:

"Q. You may detail, Mr. Ashley, the method of making such survey, together with the markings that were put upon the ground to identify the sections."

To which question, the objection thereto having been by the court overruled, the witness answered in substance as follows:

"A. I described the point I started from. I followed up the railroad until I began to cut up the country into sections, then followed the general order of doing work as is done by the Government deputies. I did the marking at the order of Mr. Buckley, and marked the corners just the same as if I had marked them on a Government survey. These markings were similar to those made by a Government sur-

veyor, made by the same instruments and the same way that the Government manual instructs its surveyors to do. I marked the section corners, quarter-section corners, and when I passed what was called the standard lines I would mark those. As to the section corners, we blazed them, very particularly and carefully, so that a person could follow them right along without an instrument. The purpose was to definitely locate the railroad land, so that the railroad could cut the timber. I believe the survey which I made was a very correct one. I used all the care I could use. My instruments were all in perfect adjustment. I took my meridian at least twice a week, and I allowed on my calculations for the latitude. In making these calculations, I used the same tables which are used by the Government surveyors."

VII. The court erred in denying the motion of counsel for plaintiff to strike out all of the testimony of the witness John K. Ashley, given over the objection of counsel for plaintiff concerning the establishment by him of section five, township twenty-six north, of range thirty-four west, said testimony being in substance that in 1886 and 1887 the witness worked for the Northern Pacific Railroad Company in Montana, and during that time made a survey of township twenty-six north, of range thirty-four west, for the Northern Pacific Railroad Company, for the purpose of ascertaining the even and odd numbered sections, and to find out the railroad sections in said township; that the said survey

was made under the orders of the general manager of the railroad company, and for the benefit of the said railroad company. That on that occasion witness surveyed what would be section five of township twenty-six, north of range thirty-four west, established the corners of said section five and marked the same.

Said motion to strike out the said testimony having been made by counsel for plaintiff upon the ground that the same was incompetent, irrelevant, and immaterial, for the reason that, the said township being unsurveyed lands, any private survey made by the witness for the Northern Pacific Railroad Company was of no legal effect whatever, and that any location that the witness might have made by reason of such survey would be of no legal effect, and would not preclude the Government from maintaining this action. And on the further ground that, until the survey has been officially made by the proper officers of the Government, and the expenses of such survey had been paid for, the legal title to the lands in question in said cause, even though within the limits of the railroad grant, would be in the Government of the United States.

VIII. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness G. W. Sparks, concerning what was claimed to be section five, township twenty-six north, range thirty-four west, to wit:

"Q Tell the jury what posts or monuments you found upon the land designating the township and section and range."

To the question, the objection having been by the court overruled, the witness in substance answered as follows:

"A. I found four corners and three-quarter posts. The northeast corner of section five was the first corner that I found that I could read. The corner was a hemlock tree, blazed on four sides with each section marked on, and four witness trees, and I think these four witness trees were all hemlock. They were marked to show the bearings. The markings of these sections read just the same as it did on each one of the corners. Proceeding west along the line of the section, I found a quarter post marked 1/4 sec. B. T. I found a northwest quarter post. That was also marked similar to the corner described, only there was a stake there. There were bearing trees. Coming down to the southwest corner, I found a southwest corner. It was properly marked and bearing tree in place. As to the southeast corner, the southeast corner was burned. I found the trees there. I made an effort to trace the lines as indicated by those posts."

IX. The court erred in overruling the objection of counsel for plaintff to the following question asked of the witness O. J. McConnell, relative to what was claimed to be section five, township 26 north, range thirty-four west, to wit:

"Q. Prior to entering into the contract with Mr. Oman, what did you do with reference to the title of section five? Did you make any arrangements as to that?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. Yes, sir. About August, 1897, we made a contract with the Northern Pacific Railroad Company for the purchase of section five. That contract resulted in a deed."

X. The court erred in admitting in evidence, over the objection of counsel for plaintiff, a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company, the said deed being dated the 7th day of November, 1898, and being for all of unsurveyed section 5, township 26, north of range 34 west.

XI. The court erred in sustaining the objection of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of the witness George F. Rigby, a surveyor, to wit:

"Q. State whether or not the survey which you made was over the same territory that had been prior thereto surveyed by the Northern Pacific Railroad Company."

In answer to which question the witness Rigby, if permitted to do so, would have answered that the survey made by him, referred to in the question, was over the same territory and covered the same ground as that which had been surveyed prior thereto by the Northern Pacific Railroad Company.

XII. The court erred in sustaining the objection of counsel for the defendants, the Mon-

tana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of George F. Rigby, a surveyor, to wit:

"Q. What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railroad Company?"

In answer to which question, if he had been permitted to do so, the witness would have stated that the survey made by him did not conform to the survey made by the Northern Pacific Railroad Company, but that according to the survey made by him the lines defined by the Northern Pacific railroad survey were located three-fourths of a mile east of where they should have been located.

XIII. The court erred in sustaining the objection of counsel for the defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the offer of counsel for plaintiff, the United States of America, to prove by the witness, George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel, covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company theretofore testified to in the trial of the case, and to prove by said witness Rigby that the survey made by him and the said Vogel showed that what had been established or located as section 5, township 26 north, of range 34 west, under the Northern

Pacific survey, was not section 5 at all, but that section five was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

XIV. The court erred in refusing to allow plaintiff to prove in rebuttal, by the witness George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company, theretofore testified to in the trial of this case, and that the said survey so made by said witness and Vogel, showed that what had been established or located as section 5, township 26, north of range 34 west, under the Northern Pacific survey, was not section 5 at all, but that section 5 was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

XV. The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said cause, to instruct the jury to return a verdict in favor of said defendants.

XVI. The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said case, to instruct the jury to return a verdict in favor of the said defendants upon the ground that the Government had not

shown that it was the owner of the lands from which the timber was cut.

The cause came on for hearing before the Circuit Court of Appeals for the Ninth Circuit at San Francisco, on the 5th day of October, 1903. That court defers its decision until it shall have been instructed by the Supreme Court of the United States upon three questions of law, which are set out in the certificate of said Circuit Court of Appeals, which is as follows (transcript, p. 1):

> This cause having come on to be heard upon the pleadings and the bill of exceptions upon a writ of error whereby it is sought to review the judgment of the district court of the United States for the district of Montana in an action brought by the United States against the defendants in error to recover the sum of $15,000, the value of 2,000,000 feet of lumber manufactured out of timber and logs which had been cut by the Montana Lumber and Manufacturing Company from unsurveyed Government lands situate within the district of Montana, and converted by the defendants in error to their own use and benefit;
>
> And it appearing that the complaint in said action was filed on December 30, 1901; and that it alleged that on July 10, 1901, and long prior thereto, the plaintiff in error was the owner and entitled to the possession of 2,000,000 feet of lumber which it was alleged had been cut by the defendants in error, and that the said timber was cut from unsurveyed Government lands, which, when the same shall have been surveyed, will be township 26 north of range 34 west,

Montana meridian, in the State and district of Montana; that on said 10th day of July, 1901, and while the plaintiff in error was so the owner of said lumber, the defendants in error wrongfully and unlawfully took possession of the same, disposed of and converted the same to their own use and benefit, to the damage of the plaintiff in error in the sum of $15,000, which is the value of said lumber; that to this complaint the Northern Pacific Railway Company filed its separate answer, denying the material allegations of the complaint; that the other defendants in error made a joint answer likewise denying the material allegations of the complaint, but alleging by way of further answer and defense that although they cut timber from the premises mentioned in the complaint, all of said timber was cut from that portion of said township which will be, when surveyed, section 5, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was at the time of the cutting of said timber, by mesne conveyances from the Northern Pacific Railway Company, the owner of and entitled to the lands upon which said timber was growing at the time it was cut;

And it further appearing that upon the issues so joined the cause was tried before the court and a jury, and that it was proven that the land from which the timber was cut was within the limits of the Congressional grant to the Northern Pacific Railway Company, was unoccupied pub-

lic land, and was wholly unsurveyed, and that the nearest Government survey is approximately 20 miles distant; that for the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of the plaintiff in error, permitted the Montana Lumber and Manufacturing Company to introduce evidence of a private survey of a portion of the township in question, made by one John K. Ashley, a civil engineer and surveyor, and that it was made by him in the year 1886 for the Northern Pacific Railway Company for the purpose of ascertaining the location of the railroad sections contained in said township, and to prove by other evidence that the timber cut by the Montana Lumber and Manufacturing Company was taken from what Ashley has designated and defined by means of his survey to be section 5 of said township; that after the defendants had rested their case, the plaintiff in error offered to prove in rebuttal by George F. Rigby, a surveyor and an engineer, a witness called on behalf of the United States, that he and another had made a survey of the same lands and that the Ashley survey was incorrect, and that section 5, as located by Ashley, had been placed three-quarters of a mile too far east; that the court refused to permit the witness to testify to these facts, and that thereupon the court instructed the jury to return a verdict for the defendants in error, on the ground that the United States had failed to prove its ownership of the land from which the timber was cut;

And it appearing that the rulings of the district court in admitting in evidence the testi-

mony as to the Ashley survey and in excluding the evidence offered by the plaintiff in error to rebut the same, and in directing the jury to return a verdict for the defendants in error on the ground above stated, are assigned as error; and

Whereas this court is divided in opinion upon the questions of law so presented, and another case involving similar questions is pending before this court on writ of error to the district court of the United States for the district of Montana, and a third case is pending before this court on writ of error to the circuit court of the United States for the eastern division of the district of Washington, and it is of public importance that said questions be speedily and finally determined;

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination:

First. Did the district court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, when surveyed by the United States, section 5 of township 26 north, of range 34 west, Montana meridian?

Second. Did the court err in excluding the evidence offered, on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

Third. Did the court err in instructing the jury to return a verdict for the defendants in

error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?

ARGUMENT.

The act of Congress of July 2, 1864, granting lands to the Northern Pacific Railroad Company, is well known to the court, and it is only necessary here to quote sections 3 and 6. They are as follows:

> SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors, and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been

granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

* * * * *

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or preemption before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, eighteen hundred and forty-one, granting preemption rights, and the Acts amendatory thereof, and of the Act entitled "An Act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

As to survey, we quote from the act of July 15, 1870, "An act making appropriation for sundry civil expenses of the Government for the year ending June 30, 1871, and for other purposes:"

* * * * *

For the survey of the public lands within the limits of the land grant to the Northern Pacific Railroad Company in a direct line extending from Duluth, on Lake Superior, to George-

> town, on the Red River of the North, ninety-five thousand nine hundred and eighty dollars: *Provided*, That five thousand dollars of this appropriation shall be expended for office work by the surveyor-general of Minnesota: *And provided further*, That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest.

At the outset it will thus be seen that while the grant was one *in præsenti*, the survey was to be made under the immediate direction of the President of the United States, and that no conveyance or patent should issue to the parties interested until the railroad company had deposited funds to cover the cost of surveying the lands, so that any private survey or survey made at the instance of private parties could have no legal efficacy, and that no conveyance of such unsurveyed lands could be of legal effect, however much the railroad company may have done to effect an equitable claim in favor of private parties to lands to which the railroad company, after compliance with the terms of these acts of Congress, would become legally entitled.

It is true that the complaint in this case sets forth the fact that the lands, while unsurveyed, would have been located upon survey within a certain township, but it must be borne in mind by this court that this allegation in the complaint particularizing the township

was in deference to the almost uniform holding by the Federal courts of the Northwestern States that such an allegation is necessary in order to show the locality from which the timber is taken by trespass or conversion. But we here assert and maintain that such allegation, made in deference to such erroneous holding of these courts, was purely surplusage and that it would be sufficient in any case to have alleged merely that the property in question was taken from unsurveyed public lands of the plaintiff within the district of Montana, or at most within the boundaries of a county and within the district of Montana. If this contention be correct, it follows that it was not necessary for the plaintiff in this case to have proved upon the trial the exact location of the premises from which the timber was cut by any survey whatever in order to establish its prima facie case.

THE GOVERNMENT'S PRIMA FACIE CASE.

What showing was necessary to establish the plaintiff's prima facie case?

All lands within the district were presumed to belong to the United States, and hence no proof was required upon that subject.

The appropriation or conversion of the timber and the amount thereof was solemnly admitted in the plea of the defendant. (Transcript, p. 7.) This was also proved. (Transcript, pp. 17–22.)

It was also shown that the timber was appropriated from standing trees upon the public lands which de-

fendants had cut down and manufactured into logs and lumber.

No effort was made by defendants to have the court direct the jury to return a verdict for defendants by reason of any failure in proof at the time the Government rested its case.

THE DEFENDANTS' CASE.

To support their special defense the defendants then offered a purely private survey. It had no sanction of authority from any officer of the Government. It was not in pursuance of any act of Congress. It was made in the interest of parties directly interested with these defendants. Its admission was objected to by the plaintiff. It was admitted by the court. Its admission was excepted to, and the party making it admitted its fallibility on cross-examination.

The other evidence was a deed from the Northern Pacific Railroad Company of the alleged section 5 to the defendants, which was objected to by plaintiff; the objection was overruled, the evidence received, and the ruling of the court excepted to.

The only other evidence for defendants was that tending to show that the timber in question was taken by defendants from the alleged section 5, according to the private survey.

THE REBUTTAL.

Conceiving that the evidence thus received should be rebutted, the Government offered to show that the survey was not correct and that the lands in question

by a proper survey would not be section 5 at all. This proposed testimony was rejected by the court, to which ruling an exception was taken.

THE ACTION OF THE COURT.

The court then took the case from the jury upon the ruling that the plaintiff had not proved its ownership of the land, and the court's action was duly excepted to.

We have thus brought the case, for the purposes of argument, into a small compass. The case was taken to the Circuit Court of Appeals upon an assignment of errors, and the questions submitted by them to this court take the place of assignment of errors here.

THE FIRST QUESTION.

We shall now proceed to consider the first question certified by the Circuit Court of Appeals, namely: Did the District Court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley, and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, and when surveyed by the United States, section 5 of township 26 north of range 34 west of the Montana meridian?

If there is a thoroughly established and fully recognized principle of law, it is that a sovereign makes its own surveys and fixes the boundaries of its grants. The Ashley survey, made under the direction of the Northern Pacific Railway, was incompetent, and the fact that Ashley testified that it was made after the method of Government surveys did not relieve it of

its vice. The claim that a grantee has the right to establish the boundaries of his grant by his own survey will certainly not be recognized by this court. Not only has the grantee no right to establish the boundary; a court of justice has not such a right. In the case of *Cooper* v. *Roberts*, 18 How., 175, this court said: "The courts of justice have no authority to mark out and define the land which shall be subject to the grant." To the same effect is *Cragin* v. *Powell*, 128, U. S., 691. In *Robinson* v. *Forest*, 29 California, 325, the principle is laid down that neither a private survey nor one made under the authority of the State will answer the purpose.

Said the Supreme Court of the United States, in the case of *Magwire* v. *Tyler*, 8 Wall., on pages 660–661:

> Where the documentary evidence of title produced by the claimant contains no sufficient lines or boundaries to show that any definite and distinct parcel of land was *severed* from the public domain, the universal rule, as settled by repeated decisions of this court, is that the concession in such a case creates no right *of private property in any particular tract of land* which can be maintained in a court of justice without an *antecedent survey*, * * * and such a title, until the survey was made, attached to *no land*, nor could a court of justice ascertain its boundaries, as that power was reserved to the executive department of the Federal Government.

Mr. Attorney-General Miller, in considering the surveys made by the Northern Pacific Company, said:

> Neither has it authority to select and locate its sections and then despoil the sections it has selected. The United States makes its own surveys. Such surveys are without authority of law and without legal effect. (Vol. 20, Op., p. 542.)

The Supreme Court, in the case of *Cragin* v. *Powell*, *supra*, said:

> From the earliest days matters pertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior.

Mr. Justice Bradley, in the case of *United States* v. *McLaughlin*, 127 U. S., 428, says:

> Grants are of three kinds: 1. Grants by specific boundaries where the donee is entitled to the whole tract, whether it be more or less. 2. Grants of *quantity*, as of one or more leagues *within a larger tract* designated by what are called outside boundaries, where the donee is entitled to the quantity specified and no more. 3. Grants of a certain place or rancho by name, where the donee is entitled to the whole tract. * * * In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation, but in the second kind—a grant *of quantity only* within a *larger tract*—a grant is really *a float*, to be located *by the consent of the Government before it can attach to any specific land.*

In *Grogan* v. *Knight*, 27 Cal., 519, the court said:

> It requires no argument to prove that the survey of public lands of the United States into sections and subdivisions of sections can be made only under the authority of Congress. * * * The selection of a particular tract as a subdivision of public land in anticipation of the survey by the United States would be no less wanting in authority than would the selection of a designated subdivision in anticipation of the grant by Congress.

In *Robinson* v. *Forrest*, 29 Cal., on page 325, the court said:

> Neither a private survey nor one made under the authority of the State will answer this purpose, but it must be made *under the authority of the United States*. Even after a principal meridian and a base line have been established and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions *can be said to have any existence* until the township is subdivided into sections and quarter sections by an approved survey. The lines are *not ascertained* by the survey, *but they are* CREATED.

In *Middleton* v. *Low*, 30 Cal., 605, the following language occurs:

> There is, in fact, NO SUCH TRACT OF LAND as that described in the petition until it has been located within the Congressional township by an actual survey and establishment of the lines, under the *authority of the United States*, and the survey has been approved by the proper United

States surveyor-general. A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has *no separate legal identity* until the survey is made and approved under the authority of Congress.

Cited and approved in *Central Pac. R. Co.* v. *Nevada*, 162 U. S., p. 525, and *Bullock* v. *Rouse*, 81 Cal., pp. 593–595.

In the case of *Blake et al.* v. *Doherty et al.*, 5 Wheaton, 358, Mr. Chief Justice Marshall, delivering the opinion of the court, said (p. 362):

> But the court also admitted what is called a general plan and a survey made prior to the plaintiff's entry of the land, as claimed by the defendants. The bill of exceptions does not so describe this general plan as to enable the court to say with certainty what it is. If it is a plan made by authority, in conformity with any act of the legislature, it may be submitted, with other evidence, to the consideration of a jury, to avail, as much as it may, in ascertaining boundary.
>
> But the court has also permitted what is denominated a demarcation, which we understood to be a private survey, made by direction of a party interested under the grant, and assented to by the defendants, to be given in evidence. This private survey might have been made on any other part of the west fork of Cane Creek with as much propriety as on that where it has been made. It would have been equally admissible if placed anywhere else on that stream. To allow it any weight would be to allow the grantee to appropriate, by force of

> a grant, lands not originally appropriated by that grant. This would subvert all those principles relative to conveyances of land which we have been accustomed to consider as constituting immutable rules of property.

In *United States* v. *Hanson*, 16 Peters, 194, Mr. Justice Catron delivered the opinion of the court, and upon the subject of private survey said:

> In contrast to the official survey and return, how does this private one of Mr. McHardy stand? No proof was made that it was on the land granted; the surveyor does not even so assert, and there is no plat in the record; did it, however, appear in the clearest manner on the face of the paper it would be of no value. The private surveyor acted not for and with the interests of the Government, but at the instance of the grantee, and for his interest and against the Government. The survey was a private act * * *

Les Bois v. *Bramell*, 4 How., 449, was an attempt to make title through an old Spanish concession, in which it was necessary to establish the boundaries of the grant, and Mr. Justice Catron, at page 457, said:

> The survey referred to was one made of the commons in 1806, by James Mackay; and on a plat of the survey, filed with a notice of claim before the board of commissioners organized by virtue of the act of 1805, to examine and report on French and Spanish claims, this of Les Bois was laid down with six others. Mackay's survey was a private one, made at the instance of

> the inhabitants of St. Louis, and was not binding on the rights of anyone.

To the same effect is the case of *Mackay et al.* v. *Dillon*, 4 Howard, 448, which was heard and decided concurrently with the Bramell case above quoted from, the same learned justice delivering the opinion of the court.

In the case of *Glenn et al.* v. *United States*, 13 Howard, 256, which was an attempt to have a Spanish grant confirmed, private surveys in support of the grant were produced, but the court at page 256 said:

> The surveys produced to us are private ones and of no value in support of the claim.

In *Smith* v. *The United States*, 10 Peters, 326, it was again attempted to support the grant of land by the governor-general of Louisiana by survey made by the grantees, and Mr. Justice Baldwin in that case laid down in clear and strong language the principle which we urged upon the court at the beginning of the discussion of this first question. At page 355 he said:

> We have then to inquire whether a private survey made in 1811 could be so connected with the grant of 1796 as to operate, by relation, to make out a title to the land claimed in March, 1804. The laws of the United States give no authority to an individual to survey his his grant or claim to lands; he may mark lines to designate the extent and bounds of his claim, but he can acquire no rights thereby. * * * No government gives any validity to private surveys of its warrants or orders of survey; and we have no reason to think that Spain was

> a solitary exception even as to the general domain, by grants in the ordinary mode, for a specific quantity, to be located in one place; *a fortiori*, where a grant, *sui generis*, might by its terms be so split up as to cover every saline, mineral, and water-power site in the whole territory. Of all others, the survey of such a grant ought to be made by an authorized officer. If the grant was a lawful authority for such selections, its execution by survey ought to be so supervised that the selections should be made in a reasonable time, quantity of land and spots selected.

It seems almost unnecessary to draw this court's attention to the principle for which we are contending and the authorities in support thereof. We do so only because a high appellate court has asked this court for instruction upon the question.

If the right to make survey and establish the boundaries of a public grant belongs entirely to the sovereign power, it requires no argument to convince the court of the error committed by the learned judge of the trial court.

Even if this were not so, Congress, in the act of 1864 granting land to the Northern Pacific Railway Company, and upon which these defendants rest their defense, specifically made it the province of the Government to survey these lands and to say what lands shall and shall not be taken by the railway company. Section 6 of the act is as follows:

> SEC. 6. And be it further enacted, That the President of the United States shall cause the

> lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

Had the defendants in this case procured a survey to be made under the auspices and authority of the United States, it might have been proper evidence to support their contention that the land in question was an odd-numbered section, even though the survey may not have been the regular official survey contemplated by section 6 of the granting act. Such a course would have at least brought them within the rule, which can not be here questioned, that the Government and not the grantee shall establish the boundaries of the grant.

It is all the more difficult to understand why this Ashley survey was admitted in evidence, in view of

the testimony of Mr. Ashley. Quoting from page 26 of the record:

> I can't say that as a matter of fact these private surveys that are made by parties hardly ever coincide with the Government lines as afterwards established, because when I was a Government surveyor I never paid any attention to these private surveys, and I don't suppose that these Government surveyors to-day do. As to whether, as a matter of fact, that lots of times when surveys of this kind are made by private parties they entirely miss lines afterwards established by the Government surveys; they may and may not. Of course, it is like this: You can take two sets of chainmen and let them measure a mile, and they won't get it the same. Their alignment will be all right, but the difference in chaining might make a difference in the lines. It is true that what is claimed here as section five under the Northern Pacific survey might, after the Government survey is made, be section four or six, or some other section. * * * I didn't mean to say that this survey which I made there, by means of which I located this section five, would be exactly like the survey which would hereafter be made by the Government of the United States. * * * I didn't terminate my survey at a Government corner, or attach it to a Government survey. I tied on to the State line, which is the Government survey, but, of course, I did not know at that time where that was.

Thus the court will see that, by his own testimony, Mr. Ashley impeached the correctness, validity, and value of the Northern Pacific survey.

The Northern Pacific Railway Company and its predecessor, the Northern Pacific Railroad Company, have had constructed lines for approximately a score of years and a line of definite location probably for a longer period. It is a singular circumstance that during all of that time they have applied for no survey of the lands in question by depositing the costs and expenses thereof with the proper United States authorities. In this instance, and probably in a number of other like cases, the value in the lands is confined to the timber. Strip them of that and there would be no motive impelling the company, or its so-called grantees, to pay taxes or survey fees. But the timber would be gone without an opportunity for the Government to hold the company responsible for anything, and thus another one of those very neat devices for overreaching both the State and Federal governments will have succeeded.

Shrewd parties, by sharp practice, have defeated the will of Congress, and, unfortunately, with the sanction of some of our western Federal courts. One of the shrewdest of these manifold schemes is the attempt to own this unsurveyed land so far as to sell the valuable timber growing thereon and yet not own it to the extent of securing a Government survey or paying State taxes.

Whether this case was brought by the United States

upon the theory that the railroad company and its conveyees were mistaken and were really cutting from what would be even-numbered sections, or upon the theory that it was in doubt whether they would be even or odd numbered sections, or still further, upon the theory that while it might be the odd-numbered sections and that the defendant had no right before receiving the legal title, as provided by the act of Congress, to venture upon the land and cut timber therefrom, seems to us unimportant. In any event they were violating the law. They were not ignorant of the law. It was plain, open, unqualified trespass.

If the railroad company has no right to take timber from these lands until the regular Government survey has been made, and that is beyond doubt the law, then the Ashley survey was inadmissible for two reasons—first, the survey was a private one, and second, it was not material upon what sections the timber was cut, since there is absolutely no right on the part of the company to take timber at all before an unqualified legal title is vested in the company by reason of such Government survey.

THE SECOND QUESTION.

The second question will now be discussed. It is as follows: "Did the court err in excluding the evidence offered in behalf of the plaintiff in error tending to show that the Ashley survey was erroneous?"

We think the court will conclude that there is but one real question in this case, and that is whether the claim of the defendants that the limits of their grant

can be established by a private survey is correct. We also think that the court must decide against such claim. But, for the purposes of argument upon the second question, we must assume that the testimony and survey of Ashley were properly admitted.

We do not contend that the Rigby or Government survey is the official survey contemplated by the sixth section of the granting act. In fact, it is not. But if the Ashley survey was admissible in evidence, certainly the Government had a right to rebut it by the production of another survey. In the direct testimony of Rigby the following question was asked by the Government's counsel: "What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railway Company?" An objection to this question by counsel for the defendants was sustained. If the court had permitted the witness to answer the question he would have answered that, according to the survey made by him, the lines defined by the Northern Pacific survey were located three-fourths of a mile east of where they should have been located. And thereupon counsel for the Government offered to show that a survey was made by Rigby and one Vogle covering the same territory as that covered by the Northern Pacific survey, and that the Rigby survey showed that what was established as section 5 by the Northern Pacific survey was not section 5 at all. (Transcript, p. 38.) This testimony and evidence were rejected. Thus was a private survey admitted in

evidence and a survey made under the authority and auspices of the Government of the United States rejected, although the latter was entitled to at least as much respect and weight as the private survey.

It was contended in the court below, and will doubtless be contended here, that the Rigby or Government survey was not proper evidence in rebuttal because it did not show wherein the Ashley survey was incorrect. It will be seen by the record (p. 32) that Government's counsel had barely started to examine Rigby as to the differences in the two surveys when that line of examination was completely obstructed by the court's ruling against it. Be that as it may, there is no force whatever in such contention. The introduction of the survey and testimony of Ashley was an attempt to establish a fact, viz, that the land in question would be section 5 when finally and officially surveyed. Assuming this testimony and survey to be correct, that would have been their final effect. Now, the testimony and survey of Rigby were offered for the purpose of disproving what was attempted to be shown by the defendants as a fact. It is not necessarily the method of proof or the means whereby a fact is sought to be established that is subject to evidence in rebuttal; it is the fact itself.

Had the Government so desired, it might have shown by a competent surveyor that the method adopted by Ashley was wrong or that an error was made in his calculations, and that therefore the result was wrong. But equally effective was another survey

showing the *result* of the Ashley survey to be wrong. A witness might testify that a certain event occurred at 10 o'clock and the opposing party might prove the incorrectness of the statement upon cross-examination by showing that he had arrived at his conclusion that it was 10 o'clock by an illogical process of deduction, which would disprove that which is sought to be established. But equally would his testimony be rebutted if another witness should testify that the event occurred at 11 o'clock.

THE THIRD QUESTION.

The third question is: "Did the court err in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?"

Reviewing the pleadings in this case, it will be observed that the Government filed its complaint alleging that it was the owner and entitled to possession of the lumber in question, which had been taken from unsurveyed Government lands, which lands, when the same shall have been surveyed, will be township 26 north of range 34 west of Montana meridian, in the State and district of Montana. The answer of the Montana Lumber and Manufacturing Company and McConnell and Johnson denies these allegations.

In addition to this traverse, the answer sets up an affirmative plea admitting that the land from which the timber was cut would be the same as described in plaintiff's complaint, but alleging further that the land would

be within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the Montana Lumber and Manufacturing Company was at the time of the cutting of said timber, by mesne conveyance from the Northern Pacific Railway Company, the owner of and entitled to the possession of the land upon which the timber was growing at the time it was cut. To this affirmative defense the Government filed its replication.

The effect of the pleadings, therefore, was to put the Government upon its proof as to the material allegations of its complaint, and, if they were sustained, to put the defendants upon proof of their special plea. But it will be observed that the complaint of the Government did not allege that the timber was taken from any particular section. Nor was such an allegation necessary in order to show a cause of action. If, therefore, the Government proved that the timber was cut from unsurveyed Government lands, its case was made. It was under no obligation to anticipate the defense that the land upon survey would be an odd-numbered section, and therefore within the grant of 1864 to the Northern Pacific Railway Company.

Assuming that the Government must prove its title to land in the public land States, the same as any other plaintiff, which we do not concede, we submit that that requirement was amply met. Special Agent Chadwick, of the General Land Office, testified that he was acquainted with township 26 north, of range 34 west, of the Montana meridian and that the lumber in

question was taken therefrom. The official survey had not been extended over the lands in question (Transcript, p. 17). Upon cross-examination he stated that he knew this to be township 26 north, of range 34 west, by the general map of Montana and Land Office records, and by the fact that if the Government lines were extended over the land in question they would show it to be of such description. (Transcript, p. 18.)

The effect of the grant of 1864 was to reserve to the Government the even-numbered sections, so that, owing to the peculiar admixture of title, when the Government established, by an officer of the General Land Office, that the land generally was public land, the fact, if true, that the timber was taken from an odd-numbered section, was peculiarly a matter of defense, particularly as the lands had not been surveyed. The Government was under no obligation, as above stated, to prove the negative fact that the land was not an odd-numbered section, nor was it under any obligation to prove that it had not parted with its title by patent or otherwise; so that, unless it was incumbent upon the Government to go back to the source of its title and prove its acquisition of the land in question through the Louisiana Purchase, which is, of course, the subject of judicial notice, there was nothing more as to title to prove.

But, aside from the above contentions, the Government, when the defendants sought to prove the allegations of their special defense (the burden of proof so to do being upon them), offered to prove by its surveyor that the land would not be section 5, but the

court refused to receive such proof, although it would have made the Government's case doubly strong. Under our system of civil procedure the test as to whether a case has been made is the effect of all the evidence offered by the plaintiff, and even had the Government failed to make its case in chief, and the opportunity for nonsuit when the Government rested its case was not taken advantage of, the evidence subsequently offered, even though it may have been in rebuttal, would have had the effect of making the Government's case complete.

The Government, therefore, not only sustained the allegations of its complaint and proved all that was necessary under the pleadings and in the nature of the case, but offered to go beyond the requirements of the pleadings and to show that the land in question was not that of the defendant, although it was not permitted to do so. The Government having proved the allegations of its complaint, the defendants sought to establish the truth of their special defense, namely, that the land was section 5 of the Northern Pacific grant, and upon what principle of evidence the Government was denied the right to rebut such proof is beyond our comprehension, particularly as we have shown in the discussion of the first question certified by the Circuit Court of Appeals that the evidence offered by the defendant in support of its affirmative plea was incompetent.

If the survey was offered by the defendants to disprove the Government's case, the Government should have been given an opportunity to prove that it was

incorrect. If it was offered in support of the defendant's special plea, the evidence and testimony attacking the correctness of the Ashley survey was equally receivable in rebuttal; so that in any event the Government's case was made.

It is true that some authorities hold that the grant to the Northern Pacific Railway Company was a grant *in præsenti*. But it is also a matter of law that no title can pass to any particular land until the regular official survey has been made, for until then there is no identification of the land granted. Therefore the Government, by its proof of the fact that township 26 was Government land, sustained the allegations of its complaint, and the defendants were therefore forced to disprove the Government's case if they could. This they sought to do by the same evidence which they were to offer in support of their special plea. If, then, such evidence was incompetent, it neither disproved the Government's case nor proved their special plea.

Outside of the thirteen original States of the Union we have been unable to find that any court has ever decided, or that any counsel has ever made the claim, that it was necessary that the United States, being the party plaintiff, should prove the title to its land. As in England primarily all lands were property of the Crown, so in the United States all lands outside of the said original States are presumed to belong to the United States, and any party claiming a title adverse to the Government must prove his way from the Government by a regular chain to himself. In the very nature of things this must be true.

Had the United States attorney, at the trial of the case, conceived it his duty, as a matter of law, to prove the Government ownership of the lands in question, what course could he have pursued in such an attempt? If he had offered in evidence the treaty with France it would have been said that that is a matter of history of which the court is bound to take judicial notice. If, as the next step, he had attempted to show the organization of the State of Montana and that the Federal Government had not transferred the lands ceded to the United States within its boundaries to the State of Montana, that would also have been a matter of public enactment and a negative proposition. If he had attempted to go back still further to the organization of the same Territory within Territorial limits by Congress, the same would have been the case. That was a matter of public enactment. If he had offered plats and maps from the General Land Office there would have been nothing in them admissible as evidence tending to show a legal title in the United States

In the event of any attempt to offer proof to show that the United States had never patented or granted the lands to any private party, that would have been impossible, and the utmost that he would have been able to do was to put some witness connected with the General Land Office upon the stand to testify that he had made diligent search among the records and had found no such grant or conveyance, especially in view of the fact that it was conceded that no survey of the land in question had ever been made How, then, we

ask, was the Government of the United States to proceed to show that it was the owner of the lands in question? There is but one conclusion that can be reached, namely, that it is a presumption of law in all cases that the sovereign, the United States of America, was and is the owner of all lands, and that he who seeks to claim adversely must prove his way from the Government to himself. Hence it seems to us, as an irresistible conclusion, that the trial court was in the plainest error possible in holding that the United States had not proved its ownership of the lands in question.

Counsel for defendants, in the Circuit Court of Appeals, seem to have taken some comfort from the case of the *Northern Pacific Railroad Company* v. *Hussey*, 61 Fed. Rep., 231, from the fact that the court there held that this same railroad company had been held to have had such an interest in unsurveyed lands within the limits of their grant as entitled it to enjoin trespassers from cutting timber. There can be no question about the correctness of the rule of the court in that case. The complainants, after their grant had been obtained, had an equitable interest in the land within the limits of their grant even though the lands were unsurveyed. Mere wrongdoers committing trespass within the limits of the grant were absolutely certain to be trespassing upon lands to which the company would ultimately get the legal title, or upon lands of the United States. If the United States did not move to check the trespassers upon the

mere chance that they might be cutting from lands which, being surveyed, might prove to belong to the railroad company, the company, having an equitable interest, of course had the right to protect its expectant estate from waste. It is an entire misconception, however, of the case at bar, where the question of legal title and not equitable interest is involved, to invoke the principle enunciated in the Hussey case in support of this case.

They also cited the case of *Deseret Salt Company* v. *Tarpey*, 142 U. S., 241. But there the Government of the United States, in the regular manner, had established at least one of the lines of the section in question, so that its grantee could with certainty take possession, and have done so, while in this case the record shows that there was not a Government line established within 28 miles of the land in question, the whole territory within any reasonable distance being entirely unsurveyed. The language of Mr. Justice Field quoted by counsel in the brief before the Circuit Court of Appeals was, in effect, that the reason for the passage of the act requiring the payment of charges and retaining title in the Government was to preserve the Government's control over the granted property, so as to enable it to enforce the survey costs, and merely shows that the Government had preserved such title, and while it did so preserve it the right of possession went with it, and the actual possession as well. And it makes no difference in this case what was the object of the Government in forbidding the

issuance of the legal title, so long as it actually was forbidden.

In the case of *U. S.* v. *Loughrey*, 172 U. S., 206, the title had been granted to the State as trustee for the benefit of a railroad company. The lands had all been surveyed and were capable of identification as soon as the line of permanent location was fixed. In such a case it was entirely proper to hold that the title was in the State as trustee and until it was revoked by proper action in the court for nonfulfillment of the purposes for which the trust was created, the United States could not maintain trespass. But in this case no surveys were made, so there could be no identification; no title was granted to a State in trust for the benefit of the grantee *in præsenti;* and a statute had actually been passed forbidding the issuance of any title papers to the grantee until the costs of survey had been deposited.

We respectfully submit that the three questions asked of this court by the Circuit Court of Appeals should each be answered in the affirmative.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 125.—October Term, 1904.

The United States of America *vs.* The Montana Lumber and Manufacturing Company, The Northern Pacific Railway Company, et al.	On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[February 20, 1905.]

Action by the United States against the Montana Lumber Company and the other defendants for the recovery of $15,000, for the value of 2,000,000 feet of lumber which had been cut by the lumber company on unsurveyed lands within the District of Montana, and converted by the defendants to their own use. It is alleged that the land ~~for~~ which the lumber was cut when surveyed will be in township 26 N., of range 34 W., of the Montana meridian. The railway company answered separately denying the allegations of the complaint. The other defendants also denied the allegations of the complaint. Further answering, they admitted the cutting of the lumber, but alleged it was cut from land which, when surveyed, would be section 5 of said township, and that said section was within the limits of the grant made by Congress to the Northern Pacific Railway Company, and that the lumber company was at the time of the cutting the owner of the lands by conveyances from the railway company.

The case was tried to a jury. A non-suit was granted as to the railway company. Under instructions of the court a verdict was returned for the other defendants.

On the trial of the case the lumber company was permitted to introduce in evidence, over the objection of the plaintiff, a private survey of a portion of the township made by one John J. Ashley, a civil engineer and surveyor, in the year 1886, for the Northern Pacific Railway Company, for the purpose of ascertaining the location of the railroad sections contained in said township, in connection with other evidence that the timber sued for was taken from what Ashley had designated as section 5.

In rebuttal of this evidence the plaintiff offered to prove by George F. Rigby, a surveyor and engineer, that he had made a survey of the same lands, and that the Ashley survey was incorrect, and that section 5 as located by Ashley had been placed three-fourths of a mile too far east. The court ruled out the testimony. From the judgment entered upon the verdict for the defendants the case was taken by writ of error to the Circuit

Court of Appeals. Whereupon the latter court stated the facts substantially as above, and recited that there were two other cases pending involving the same questions, and that the court was divided in opinion, certified to this court the following questions:

"First. Did the District Court for the District of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, when surveyed by the United States, section 5 of township 26 north, of range 34 west, Montana meridian?

"Second. Did the court err in excluding the evidence offered, on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

"Third. Did the court err in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to proved its ownership of the land from which the timber was cut?"

Mr. Justice McKenna delivered the opinion of the Court.

In the view we take of the case the answer to the second question becomes unnecessary. The answer to the first and third depends upon the effect of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864.

The third section of that act contains the usual granting words: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns," every alternate section of public land, not mineral, designated by odd numbers, on each side of the line of the railroad when definitely fixed.

It has been decided many times that such grants are *in præsenti*, and take effect upon the sections of the land when the road is definitely located, by relation as to the date of the grant. But the survey of the land is reserved to the Government, (section 6); in other words, the identification of the sections—whether odd or even—is reserved to the Government; and by the act of July 15, 1870, making appropriations for the sundry civil expenses of the Government for the year ending June 30, 1871, it was provided, in regard to the grant to the Northern Pacific Railway Company, that the cost of surveying must be paid by the company, and no conveyance should be made of the lands until such cost be paid. On account of that provision it was held in *Northern Pacific Railway Company* v. *Traill County*, (115 U. S. 600,) that the land of a railroad company was not subject to taxation. It was said, "to secure the payment of those expenses, it (the Government) decided to retain the legal title in its own hands until they were paid." See also *New Orleans Pacific Railway Co.* v. *United States*, (124 U. S. 124.) The equitable title becomes a legal title only upon the identification of the granted sections. (*Desert Co.*

v. *Tarpey*, 142 U. S. 241.) As expressed in *Leavenworth &c. Rd. Co.* v. *United States*, (92 U. S. 733–741,) "They" (the words "there be and is hereby granted") "vest a present title, . . . though a survey of the lands and a location are necessary to give precision to it, and attach it to any particular tract." The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. It was also error to instruct the jury to return a verdict for the defendants. Until the identification of the even and odd-numbered sections the United States retained a special property, at least, in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. A contrary conclusion would impair the Government's right of survey and force it into controversies over surveys made by the railroad or its grantees. It would enable the railroad company or its grantees to despoil the lands of their timber and leave them denuded, and, may be worthless, to the Government. Indeed it would reverse the statutory grant of powers and transfer the location of the sections from the Government to the railroad company. The extent and the effect of the power of the Government to make its own surveys is expressed and illustrated in the following cases: *McGuire* v. *Tyler*, (8 Wall 650;) *Cragin* v. *Powell*, (128 U. S. 691;) *United States* v. *McLaughlin*, (127 U. S. 428;) *Blake* v. *Doherty*, (5 Wheat. 358;) *Central Pacific Railway Co.* v. *Nevada*, (162 U. S. 525;) *United States* v. *Hanson*, (16 Pet. 196;) *Les Bois* v. *Barnell*, (4 How. 449;) *Mackay* v. *Dillon*, (4 How. 448;) *Glenn* v. *United States*, 13 How. 256;) *Smith* v. *United States*, (10 Pet. 326.)

There is nothing in *Northern Pacific Railway Company* v. *Hursey*, (61 Fed. Rep. 231,) which militates with these views. In that case relief was granted by injunction against a trespasser upon unsurveyed land at the suit of the railway company, its contingent interest being held sufficient for that purpose. The paramount control and property in the United States was not in question.

We, therefore, answer the first and the third question certified by the Circuit Court of Appeals in the affirmative.

Mr. Justice BREWER concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.